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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

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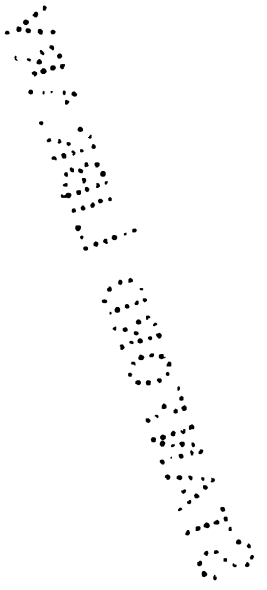

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PREFACE.

The tenth volume of Modern American Law is devoted to procedure, practice, and extraordinary remedies in law.

The first treatise, "Pleadings in Civil Actions," combines the rules of common law, statutory and code pleading. This highly important and technical subject is presented by Louis B. Ewbank, LL.B., of the Indiana Law School. He describes the forms of actions and methods of pleading, gives the necessary allegations in defending actions and discusses the simplified forms adopted by many courts today. Immediately following and appropriately supplementing this commentary is a concise enumeration of the problems arising in everyday court practice. Under the title, "Practice in Civil Actions," Hon. William N. Gemmill, LL.B., LL.D., Judge of the Municipal Court of Chicago, gives the reader the benefit of his varied and valuable experience.

The forms and methods in vogue in courts of equity are explained in "Equity Pleading and Practice," by William E. Higgins, B.S., LL.B., of the University of Kansas. "Law of Evidence," by John T. Loughran, LL.B., Fordham University, offers a comprehensive treatment of the rules of this exceed-

ingly practical branch of the law, a working knowledge of which is absolutely essential to lawyer and litigant alike.

Oliver A. Harker, A.M., LL.D., Dean of the University of Illinois Law School, in his work, "Law of Attachment and Garnishment," outlines the rights to attach and garnishee both before and after judgment. The nature of judgments, the methods of enforcing them, and the right to realize on them by execution are detailed at length by John R. Rood, LL.B., of the University of Michigan, under the topic, "Law of Judgments and Executions."

The extraordinary remedies are treated under two heads: First, "Law of Extraordinary Remedies," by Harvey N. Shepard, A.B., Boston University, and second, "Law of Habeas Corpus," by John Wurts, M.A., LL.B., M.L., of Yale University. Included in these two articles are complete discussions of the writs of mandamus, quo warranto, certiorari, and habeas corpus.

The treatises in this volume are concerned especially with the adjective law, and are particularly timely in that they throw needed light upon the mooted questions of present-day procedure and practice.

TABLE OF CONTENTS

(The figures refer to those at the foot of the pages.)

PLEADINGS IN CIVIL ACTIONS—AT COMMON LAW AND UNDER MODERN STATUTES

CHAPTER I.

NECESSITY OF PLEADING AND IMPORTANCE OF SUBJECT.

SECTION		PAGE
1.	Pleadings defined and described	1
2.	Necessity for use of pleadings in presenting case in court	2
3.	Importance of knowledge of the subject of pleading	3
4.	Disregard of rules of pleading works hardship	3
5.	Rules should be strictly complied with	4
6.	Factors which go to make up an action in court	4
7.	Systems of pleading used in different courts	5
8.	Common law rules as modified by statute	5
9.	Original writs	6
10.	Consequences of suing out the wrong writ	7
11.	Definition of action at law as distinguished from suit in equity	7
12.	Classification of actions	8
13.	Importance of a study of the statutes in relation to pleading	9
14.	Subject of pleading not unreasonably difficult	9

CHAPTER II.

HISTORY OF COURTS AND PLEADING.

SECTION		PAGE
15.	Description of ancient English courts	10
16.	Chancellor's power to issue writs and to grant equitable relief	11
17.	Courts established in United States	13
18.	Kinds of actions maintainable at common law	13
19.	Importance of choice of proper writ	15
20.	Statutes remedying abuses of the rules of pleading	16

CHAPTER III.

COURSE OF AN ACTION.

21.	Obtaining knowledge of facts and preparing declaration	17
22.	Process to bring defendants into court	17
23.	Form and substance required in pleadings	19
24.	All the essentials of a pleading must be stated	20
25.	Pleadings which defendant may use	21
26.	Dilatory pleas by the defendant	21
27.	Demurrer to the declaration may be presented	22
28.	Motion to make pleading more specific	23
29.	Plea of defendant, stating his cause of defense	25
30.	Replication and formation of issue	26
31.	Issues—Their effect and importance	27
32.	Motions in arrest of judgment	28
33.	Principal examples of pleadings to be used as aids	29

CHAPTER IV.

COMMON LAW CAUSES OF ACTION.

34.	Real actions	31
35.	Personal actions—Classification	31
36.	Personal actions on contract	32
37.	Assumpsit	33

SECTION PAGE
38. Assumpsit—Special contract partly performed..... 35
39. Covenant 36
40. Debt 36
41. Account 37
42. Torts—Classification—Exemptions 38
43. Trespass 39
44. Same subject—Direct force as an element..... 41
45. Same subject—Possession of property injured..... 41
46. Trover 42
47. Same subject—Essentials of cause of action..... 43
48. Trespass on the case..... 45
49. Same subject—Distinctive features of action on the case 46
50. Detinue 47
51. Replevin 48
52. Same subject—Immediate possession of goods..... 49
53. Same subject—Conditions of obtaining writ..... 50
54. Mixed actions..... 51
55. Ejectment 52
56. Same subject—Essentials of action of ejectment.... 52
57. Forcible entry or detainer..... 53
58. Forms of pleading to be followed..... 55

CHAPTER V.

PROCEEDINGS IN OTHER COURTS AND EFFECT OF THE CODE ON FORMS OF ACTION.

59. Common law actions and suits in equity compared.. 56
60. Courts of equity..... 57
61. Code systems of pleading..... 58
62. Divorce and special statutory proceedings..... 60
63. Codes—Modification of the law of pleading..... 61
64. Actions under the code—Forms of action abolished.. 61
65. Same subject—Ultimate facts to be alleged..... 63
66. Facts must be stated; not conclusions nor matters of evidence..... 64
67. Kind of action brought determines right of recovery 66
68. Statutes declaring special rules of pleading..... 67

CHAPTER VI.

PARTIES TO ACTIONS AND JOINDER OF ACTIONS.

SECTION		PAGE
69.	Who must be brought before the court	69
70.	Assignment to rights of action	70
71.	Joint and several rights and liabilities	71
72.	Parties to actions in torts	72
73.	Misjoinder and nonjoinder of parties	74
74.	Same subject	75
75.	Joinder of actions	76
76.	Same subject	77

CHAPTER VII.

THE PLAINTIFF'S FIRST PLEADING AND GENERAL RULES OF PLEADING.

77.	Use of forms in preparing pleadings	79
78.	Matters which need not be stated	79
79.	Statement of general rules	81
80.	Qualifications and exceptions to general rules	81
81.	Same subject continued—Other exceptions to the rules	83
82.	Pleadings must not be double	84
83.	Pleading must be certain as to place	85
84.	Certainty in stating time, quantity, and names	86
85.	Title and authority must be shown	87
86.	Certainty in all allegations required	88
87.	Obscurity and confusion to be avoided	89
88.	Direct, clear, and unambiguous averments required	90
89.	Direct and positive allegations required	91
90.	Forms of pleadings and of alleging facts relied on	93
91.	Demand for relief and conclusion	95
92.	Profert of sealed instruments—Reciting contents of writing	96
93.	Pleading facts established by written contracts	97
94.	Title of the pleadings	98
95.	Allegations must embrace all facts to be proved	99

SECTION PAGE
96. Verification of pleadings—Signing..... 100
97. Filing the declaration, praecipe and process..... 101
98. Same subject..... 103

CHAPTER VIII.

THE DEFENSES TO AN ACTION AND THE DEFENDANT'S PLEADINGS AND RULES GOVERNING THEM.

99. Preliminary investigation by attorney for defendant 105
100. Choice as between dilatory pleas..... 106
101. Use of pleas in abatement..... 107
102. Dilatory pleas must not embrace matters of defense 108
103. Demurrer to the declaration..... 109
104. Judgment on demurrer..... 110
105. Forms of demurrers..... 110
106. Challenging insufficient and indefinite pleadings.... 112
107. Ruling of court upon a demurrer..... 113
108. Motions attacking defects in pleadings..... 114
109. Plea or answer—Common law rules..... 115
110. Presentation of dilatory pleas..... 116
111. Pleadings must tend toward an issue on the merits.. 117
112. General and special traverse..... 118
113. Same subject—General and special denial..... 120
114. Plea of general denial..... 121
115. Plea of non assumpsit..... 122
116. Pleas of nil debet, non est factum, and nul tiel record 123
117. Pleas of non detinet, not guilty, and non cepit..... 124
118. The general issue as a replication..... 126
119. The special traverse..... 126
120. Requisites of a good traverse..... 127
121. Pleas of denial under the codes..... 128
122. Plea of confession and avoidance..... 129
123. Same subject—Giving color..... 131
124. Traverse and acceptance of issue..... 132
125. Departure not permitted..... 133
126. General issue must be pleaded as such..... 135
127. Surplusage 135

SECTION PAGE
128. Conclusion of pleas..... 136
129. Defenses must always be pleaded..... 137
130. Defenses generally..... 138
131. Partial answers—Set-off and counterclaim..... 139

CHAPTER IX.

THE PLAINTIFF'S SECOND PLEADING, THE CLOSING OF THE ISSUES, AND JUDGMENT.

132. Replication—Plaintiff's second pleading..... 141
133. Replying new matter..... 142
134. Closing the issues and trial..... 143
135. Same subject..... 144
136. Verdicts and findings..... 145

Bibliography 146

PRACTICE IN CIVIL ACTIONS

PART I.

PREPARATION FOR TRIAL.

CHAPTER I.

BEGINNING SUIT.

SECTION		PAGE
1.	Praecipe	147
2.	Who should be parties plaintiff	148
3.	Who should be parties defendant	149
4.	Who may be made joint plaintiffs	149
5.	Misjoinder and nonjoinder	150
6.	Service of writ	150
7.	Motion to quash the return	151
8.	Pleadings	152
9.	Written interrogatories	153

CHAPTER II.

PRELIMINARY MOTIONS.

10.	Motion for judgment on the pleadings	154
11.	Default	154
12.	Change of venue	155
13.	Motion to advance the cause	157
14.	Motion to continue the cause	157
15.	Setting a cause for trial	158

CHAPTER III.

NON-JURY CASES.

16.	Trial by court without a jury	159
17.	Reception of evidence by the court without a jury	160
18.	Submission of propositions of law or fact	161
19.	Findings of law and fact by the court	162

SECTION PAGE
20. Judgment on finding 162
21. Appeal and error 162

CHAPTER IV.

JURY TRIALS.

22. Right to a jury trial 164
23. Qualification of jurors 164
24. Jury lists 165
25. Drawing the jury 166
26. Examination of jurors by the court 166
27. Examination of jurors by counsel 166
28. Challenge to the array 167
29. Challenge for cause 168
30. Peremptory challenge 168
31. Swearing the jury 169

PART II.

THE TRIAL.

CHAPTER V.

OPENING STATEMENTS—EXCLUDING WITNESSES—DEPOSITIONS.

32. Court reporter 171
33. The right to open and close 171
34. Opening statement 172
35. Swearing witnesses 173
36. Excluding witnesses 174
37. Depositions—Written interrogatories 175
38. Depositions—Oral interrogatories 176

CHAPTER VI.

EXAMINATION OF WITNESSES—NON-SUIT—DIRECTED VERDICT.

39. What plaintiff must prove 179
40. Examination of defendant by plaintiff 180
41. Examination of witnesses 180
42. Cross-examination 181

SECTION PAGE
43. Voluntary non-suit 181
44. Involuntary non-suit 182
45. Motion to direct verdict 183
46. Objections and exceptions 184

CHAPTER VII.

CHARGING THE JURY—VERDICTS.

47. Submission of instructions 186
48. Argument to the jury 187
49. Charging the jury 188
50. Deliberation of the jury 189
51. Verdict 190
52. Reception of verdict 190
53. Amendment of verdict 191

CHAPTER VIII.

ENTERING JUDGMENT.

54. Motion for new trial 193
55. Arrest of judgment 193
56. Judgment on the verdict 194
57. Prayer for appeal 195
58. Writ of error 196
59. Supersedeas 197

CHAPTER IX.

APPEALS.

60. Who may appeal 198
61. When appeal must be taken 199
62. Effect of an appeal upon the judgment 199
63. Effect of issuing writ of error 200
64. Bill of exceptions 201
65. Preparing and filing record 202
66. Assignments of error 202
67. Abstracts 203
68. Briefs 203
69. Oral argument 204

Bibliography 205

LAW OF EQUITY PLEADING

CHAPTER I.

INTRODUCTION.

A. Fundamentals of Pleading.

SECTION		PAGE
1.	Courts	207
2.	Jurisdiction of a court	208
3.	Equity jurisdiction	208
4.	Equity pleading defined	209
5.	Origin of equity pleading	210
6.	An equitable cause of action	210
7.	Statement of the cause of action	211
8.	The issues of fact	211
9.	How the fact should be stated	212
10.	Facts must be stated positively	212
11.	Facts must be stated with certainty	213
12.	Strictness in pleading	214
13.	What need not be stated	215
14.	Impertinence	216
15.	Scandal	217
16.	Evidentiary facts not to be pleaded	218
17.	Conclusions of law not to be stated	219
18.	Discovery	220
19.	How discovery is stated	221
20.	Construction of pleadings	222

B. Parties.

21.	Parties—In general	223
22.	Aliens	223
23.	Same subject—Alien enemy	223
24.	Married women	224
25.	Idiots and lunatics	224

SECTION PAGE
26. Infants as plaintiffs 225
27. Infants as defendants 225
28. Joinder in general 226
29. Classes of parties 227
30. Exceptions to rule 228

CHAPTER II.

THE PLEADINGS.

A. Of the Plaintiff.

31. Definition 230
32. Of what the plaintiff's claim must consist 230
33. Formal parts of the bill 231
34. Practice parts of the bill 233
35. Stating part of the bill 233
36. Charging part of the bill 234
37. Interrogatory part of the bill 235
38. The address 236
39. Introduction 237
40. Confederating part of the bill 237
41. Jurisdiction part of the bill 237
42. Prayer for relief 238
43. Prayer for process 239
44. Practice parts of the bill 240
45. Joinder of causes of action 242
46. Multifariousness 242
47. Bill with double aspect 243
48. Definition 243

B. Of the Defendant.

49. In general—Defendant's pleadings 244
50. Definition 245
51. The defense made 245
52. Kinds of demurrers 246
53. Ore tenus 247
54. Grounds of demurrer 247

SECTION		PAGE
55.	Effect on the facts	248
56.	Definition	248
57.	Purpose of plea	248
58.	Plea must be single	249
59.	Multifarious pleas	249
60.	Multifarious pleas sometimes allowed	250
61.	Separate pleas to separate parts of bill	250
62.	Statement of plea	251
63.	Pleas classified	251
64.	Pure plea	252
65.	Anomalous plea	253
66.	Negative plea	254
67.	Same subject—Limitations	255
68.	Plea to the essentials of the bill	256
69.	Pleas to jurisdiction	256
70.	Plea to the person	256
71.	Pleas to the frame of the bill	257
72.	Another action pending	258
73.	Defect of parties	258
74.	Multiplicity of suits	258
75.	Multifariousness	259
76.	Pleas in bar	259
77.	Determination of plea	259
78.	Consequences	260
79.	Place of the answer	261
80.	Double office of the answer	261
81.	Answer must meet the whole bill	262
82.	Knowledge, information, and belief	263
83.	On interrogatories	263
84.	Answer must obey the general rules of pleading	264
85.	Objectionable answers	264
86.	Irrelevant facts	265
87.	When answer is not binding upon plaintiff	265
88.	Effect of the plaintiff's waiver of oath	266
89.	When the answer is not under oath	266
90.	Effect of answer	267
91.	Answer in support of the plea	267
92.	When no answer is required	269
93.	Definition	269

CHAPTER III.

AMENDMENTS, SUPPLEMENTAL PLEADINGS, JUDGMENTS PRO CONFESSO, AND DECREES.

SECTION		PAGE
94.	Amendments—In general	271
95.	Amendments of the bill	271
96.	Amendments of defendant's pleadings	272
97.	When amendments may be made	273
98.	Supplemental pleadings	273
99.	Exceptions	274
100.	Hearing on exceptions	275
101.	Judgment pro confesso	275
102.	Decrees	276
Bibliography		277

LAW OF EVIDENCE

PART I.

RULES OF EXCLUSION.

CHAPTER I.

PRELIMINARY CONSIDERATIONS.

SECTION		PAGE
1.	Evidence analyzed	279
2.	Same subject	280
3.	Evidence defined and distinguished from reasoning	281
4.	Judicial evidence and extra-judicial evidence distinguished	282
5.	Testimony—Documentary evidence—Real evidence.	283
6.	Evidential facts and ultimate facts	283
7.	Irrelevant matters inadmissible	284
8.	Place of the law of evidence in the general scheme of the law	285
9.	The law of evidence defined	285
10.	The rules of the law of evidence distinguished from other rules of law	286
11.	Same subject	287
12.	Relevant matters admissible	289

CHAPTER II.

UNIMPORTANT, MISLEADING AND PREJUDICIAL MATTERS.

13.	Introductory	290
14.	The rule stated	291
15.	Typical cases	291
16.	The cases explained	293
17.	Corollaries to the rule	294
18.	Matters not within the rule	295

CHAPTER III.

CHARACTER.

SECTION PAGE
19. Character of parties to the litigation—The rule stated 297
20. Reason for the rule..... 297
21. Character, when provable..... 297
22. Scope of the exception..... 298
23. Another exception..... 299
24. Admissible evidence of character defined..... 300
25. Character evidence, how presented..... 300
26. Matters not within the rule..... 301

CHAPTER IV.

CONFESSIONS.

27. Confessions—The rule stated..... 302
28. Reason for the rule..... 302
29. Confessions, when admissible..... 302
30. Typical cases..... 303
31. Confessions, how presented..... 304
32. Matters not within the rule..... 304

CHAPTER V.

HEARSAY.

33. Hearsay—The rule stated..... 305
34. Reason for the rule..... 305
35. Matters not within the rule..... 306
36. Typical cases..... 306
37. Exceptions to the rule..... 307
38. Hearsay evidence, how dealt with..... 307

CHAPTER VI.

EXCEPTIONS TO THE RULE AGAINST HEARSAY.

39. Former testimony—The exception stated..... 308
40. The exception explained..... 308
41. Satisfaction of the exception..... 309
42. Scope of the exception..... 309

SECTION		PAGE
43.	Former testimony, how shown	310
44.	Dying declarations—The exception stated	310
45.	Scope of the exception	310
46.	Same subject	311
47.	Declarations in questions of pedigree—The exception stated	312
48.	The exception explained	312
49.	Scope of the exception	313
50.	Declarations as to matters of public or general interest—The exception stated	314
51.	The exception explained	315
52.	Public or general interest defined	315
53.	Public interest and general interest distinguished	316
54.	Scope of the exception	317
55.	Private boundaries as matters of public or general interest	318
56.	Public documents—The exception stated	318
57.	Public document defined	318
58.	Typical cases	319
59.	Other considerations	319
60.	Ancient documents	320
61.	Ancient possession—The exception stated	320
62.	Different meaning of the term "ancient"	320
63.	Typical cases	321
64.	Proper custody defined	322
65.	Ancient possession, how shown	322
66.	Entries and declarations against interest—The exception stated	323
67.	Declarations against interest and admissions distinguished	323
68.	Scope of the exception	324
69.	Statements incorporated with declarations against interest	325
70.	Account books of parties to the litigation—The exception stated	326
71.	Reason for the exception	326
72.	No general American rule	327
73.	Scope of the exception	328
74.	Same subject	328

SECTION PAGE
75. Account books, how proved 329
76. The suppletory oath 330
77. Present utility of the exception 330
78. Entries and declarations of third parties made in the regular course of duty or business—The exception stated 331
79. The exception distinguished from that in favor of account books 332
80. Scope of the exception 332
81. Same subject 333
82. Entries made in the regular course of business, how proved 333
83. An extension of the exception 334
84. Declarations bearing upon the physical or mental condition of the declarant or upon his intention—The exception stated 335
85. Reason for the exception 335
86. Statements descriptive of present mental or physical distress 336
87. Statements as to intention 338
88. Typical cases 338
89. Statements of the testamentary intention 339
90. Declarations which are a part of some fact or transaction that is itself admissible—The exception stated 343
91. Scope of the exception 343

CHAPTER VII.

OPINION.

92. Opinion—The rule stated 347
93. Explanation of the rule 347
94. Matter of fact and matter of opinion distinguished .. 349
95. Opinion evidence, when admissible 349
96. Typical cases 349
97. Opinions of ordinary witnesses, when admissible ... 351
98. Expert opinion evidence 353
99. Expert opinion, how presented 353
100. Same subject; hypothetical questions 353

PART II.

FORMS IN WHICH JUDICIAL EVIDENCE MAY BE PRESENTED.

CHAPTER VIII.

REAL EVIDENCE.

SECTION		PAGE
101.	Introductory	356
102.	Real evidence defined	356
103.	Examples of real evidence	356
104.	Same subject	357
105.	The rule stated	357

CHAPTER IX.

DOCUMENTS.

106.	Proof of authorship of documents	359
107.	A document defined	359
108.	Attested and unattested writings	359
109.	Writings, how presented	359
110.	Execution of unattested writings, how shown	360
111.	Execution of attested writings, how shown	360
112.	Same subject—When the rule does not apply	362
113.	Same subject—Statutory modification of the rule	362
114.	Proof of execution—When unnecessary	363
115.	Proof of contents of writings—Best evidence rule	364
116.	Inscriptions not within the rule	365
117.	Scope of the rule	365
118.	Excuses for non-production	367
119.	Degrees of secondary evidence	369
120.	The so-called parol evidence rule	370
121.	The rule explained	370
122.	Scope of the rule	370
123.	The rule in contracts	371
124.	When the contracts rule does not apply	373
125.	The rule in wills	373
126.	Principles and rules for the construction of writings	375
127.	Technical language, how explained	375

SECTION PAGE
128. The rules stated 375
129. A typical case 376
130. Other rules 376
131. A rule of evidence relating to writings 377
132. Reason for the rule 377
133. The exception explained 377

CHAPTER X.

WITNESSES.

134. Introductory 379
135. Incompetency defined 379
136. Common law causes of incompetency 379
137. Same subject 380
138. Same subject—Statutory modifications 381
139. The rule in the federal courts 383
140. Privilege and incompetency distinguished 383
141. The privilege against self-incrimination 384
142. Scope of the privilege 384
143. Claim of the privilege by an accused 385
144. Effect of assertion of the privilege by an accused 385
145. Waiver of the privilege by an accused 386
146. Claim of the privilege by an ordinary witness 386
147. Assertion and waiver of the privilege by an ordinary witness 387
148. Same subject 387
149. When the privilege cannot be claimed 388
150. Privileged communications 388
151. Communications between attorney and client 389
152. Scope of the privilege 389
153. How the privilege is claimed and waived 390
154. Communications between husband and wife 391
155. The examination of witnesses 392
156. Direct examination—Cross-examination—Re-examination 393
157. Personal knowledge defined 393
158. Refreshing recollection 394
159. Discretion of the court 396
160. The examination in chief 396

SECTION PAGE
161. Leading questions—When not objectionable..... 397
162. A party cannot impeach his own witness..... 397
163. Cross-examination 399
164. Scope of cross-examination..... 399
165. Leading questions unobjectionable on cross-examination 399
166. Impeachment by cross-examination..... 400

PART III.

TOPICS RELATING TO THE LAW OF EVIDENCE.

CHAPTER XI.

JUDICIAL NOTICE.

167. The doctrine explained..... 405
168. Relation of the doctrine to the law of evidence..... 406
169. Matters judicially noticed..... 406
170. Judicial notice establishes a fact only prima facie... 407

CHAPTER XII.

PRESUMPTIONS.

171. The doctrine explained..... 409
172. Effect of a presumption..... 409
173. Presumptions are matters of substantive law..... 410

CHAPTER XIII.

BURDEN OF PROOF.

174. The burden of establishing a proposition..... 414
175. The burden of going forward with evidence..... 414
176. The burden of proof defined..... 415
177. Operation of the burden of proof..... 415
178. Same subject 416

SECTION PAGE
179. Operation of the burden of presenting evidence..... 417
180. Effect of a presumption on the burden of proof.... 417

CHAPTER XIV.

ADMISSIONS.

181. Confessions and admissions distinguished..... 419
182. The nature of an admission..... 419
183. When admissions may be shown..... 420
184. Solemn admissions..... 420
185. Unsolemn admissions..... 420
186. Admissions, when final..... 421
187. Admissions of parties to a record..... 421
188. Admissions of persons not parties to a record..... 422
189. The rule in conspiracy cases..... 423

CHAPTER XV.

LAW AND FACTS.

190. Introductory 425
191. Questions of law distinguished from questions of fact 425
192. Questions of fact—Court and jury..... 426
193. Verdicts of juries..... 426
194. Taking cases from the jury..... 427

Bibliography 429

LAW OF ATTACHMENT AND GARNISHMENT

PART I.

ATTACHMENT.

CHAPTER I.

ORIGIN AND NATURE OF THE REMEDY—GROUNDS FOR ATTACHMENT.

SECTION		PAGE
1.	Definition	431
2.	Origin	432
3.	Subject to strict construction	432
4.	Manner of treatment	433
5.	Who may use the remedy	433
6.	Same subject	434
7.	Against whom the remedy may be used	434
8.	Same subject	435
9.	Grounds for attachment—Classification	435
10.	Non-resident debtors	436
11.	Absconding debtors	437
12.	Fraudulent disposition of property	438
13.	Debtor contemplating fraudulent disposition of his property	439
14.	Intended removal of property from the state	440
15.	Fraud in contracting the debt	440

CHAPTER II.

AFFIDAVIT—BOND—WRIT—CUSTODY OF ATTACHED PROPERTY.

16.	The affidavit	443
17.	Affidavit jurisdictional	443
18.	Contents of the affidavit	444

SECTION PAGE
19. Same subject 445
20. Bond 446
21. The obligee 447
22. Execution of the bond 448
23. Surety 448
24. Nature of the writ 449
25. Duty of the officer receiving 450
26. Same subject 451
27. Return of writ 451
28. Attaching officer's possession 452
29. Pursuit of the removed property 452
30. Preservation against loss 453
31. Sale of perishable property 453
32. Forthcoming bond 454
33. Dissolution bond 455

CHAPTER III.

NOTICE TO THE DEFENDANT AND PROCEEDINGS IN COURT—SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

34. Personal service 457
35. Service by publication 457
36. Preserving proof of service by publication 458
37. Effect of service by publication 459
38. The pleadings 461
39. The defendant not appearing 461
40. Defendant appearing and defending 462
41. Same subject 463
42. Third party interpleading 463
43. The amendments 464
44. Amendment of affidavit 465
45. Amendment of bond 466
46. Amendment of writ 466
47. Amendments generally 467
48. Grounds for dissolution of attachment 468
49. Same subject 468
50. Same subject 469

SECTION PAGE
51. Dissolution as to others than the defendant..... 470
52. The effect of dissolving the attachment..... 471
53. Sale of attached property after judgment..... 472
54. Duty of officer as to sale..... 472

PART II.

GARNISHMENT.

CHAPTER IV.

NATURE OF THE REMEDY.

55. Definition 474
56. Nature of the remedy..... 474
57. Two kinds of garnishment..... 475
58. Distinction between the two kinds..... 476
59. Persons subject to garnishment..... 476
60. Right of action by defendant against garnishee essential 477
61. Garnishee's liability for property..... 478
62. Same subject—Trust funds..... 479
63. Same subject—Money in the custody of the law..... 480
64. Same subject 481
65. Garnishee's liability as debtor..... 481
66. Same subject 482
67. Same subject 483
68. Same subject—Promissory notes..... 483
69. Same subject—Co-debtors 484

CHAPTER V.

MANNER OF ENFORCING THE REMEDY.

70. Affidavit necessary to procure process..... 486
71. Same subject 487
72. Bond 488
73. The writ..... 488
74. Service of the writ..... 489
75. Same subject 490

SECTION PAGE
76. Amendments 491
77. Answer of the garnishee..... 491
78. Same subject 492
79. Same subject 493
80. Answer before a justice of the peace..... 494
81. Effect of the answer..... 494
82. Same subject 495
83. Right of defendant and others in the proceeding.... 495
84. Refusing or neglecting to answer..... 496
85. Judgment against the garnishee..... 497

Bibliography 498

LAW OF JUDGMENTS AND EXECUTIONS

PART I.

JUDGMENTS.

CHAPTER I.

NATURE AND ESSENTIALS.

SECTION		PAGE
1.	In general	499
2.	Elements of jurisdiction	501
3.	Same subject—Illustrated	502
4.	Nature and essentials of a court	504
5.	Nature of the business	507
6.	Organization and qualification of officers	507
7.	Time of sitting	508
8.	Place of sitting	510
9.	Power to try such cases and give such judgments	511
10.	Same subject—Depends on law defining powers and not on facts	512
11.	Same subject—Why so	513
12.	Jurisdiction of the person	514
13.	Same subject—Non-residents	515
14.	Same subject—Exceptions	517
15.	Same subject—Service on corporations	519
16.	Jurisdiction of the thing	519
17.	Jurisdiction of the question	521
18.	Same subject—Opinion quoted	522
19.	Same subject—Another case	524
20.	That procedure is jurisdictional	525
21.	Procedure not jurisdictional	527

CHAPTER II.

THE RECORD.

SECTION		PAGE
22.	Nature	529
23.	Entry of the record	529
24.	Same subject—Example	530
25.	Conclusiveness of the record	531

CHAPTER III.

EFFECT OF A JUDGMENT AS A BAR.

26.	Why a bar	534
27.	Amending and modifying judgments	534
28.	Splitting the cause	535
29.	Splitting the grounds of recovery and defense	536
30.	Cross-claims	538
31.	Fraud	538
32.	Judgments not on the merits	539

CHAPTER IV.

JUDGMENTS AS ESTOPPELS.

33.	Distinguished from bar	541
34.	Essentials of an estoppel	542
35.	Parties estopped	542
36.	Estoppel extends only to points actually litigated	544
37.	Estoppel only as to points certainly and necessarily decided	545
38.	Two actions depending on different law	546
39.	If the court that tried the first case could not try the last one	547
40.	Judgments bar and estop privies	549
41.	Judgments binding strangers	550
42.	Same subject—Judgments in rem	552

PART II.

EXECUTIONS.

CHAPTER V.

NATURE AND EFFECT OF EXECUTIONS.

SECTION		PAGE
43.	In general	554
44.	Kinds of execution	554
45.	Same subject—Capias	555
46.	Issuing the writ	556
47.	Same subject—Death	557
48.	Same subject—Who may issue	558
49.	Same subject—Form	558
50.	Controlling execution of the writ	559
51.	Who may execute the writ	560
52.	Sheriff's right to indemnity	562
53.	Sheriff's right to break in	563
54.	When levy, sale, and return may be made	564
Bibliography		565

LAW OF EXTRAORDINARY REMEDIES

PART I.

THE REMEDIES IN GENERAL.

CHAPTER I.

DEFINITIONS, ANALOGIES AND HISTORY.

SECTION		PAGE
1.	The purpose of the remedies	567
2.	Not used in equity	568
3.	Equitable analogies—Clean hands	569
4.	Same subject—Laches	569
5.	Origin of mandamus	571
6.	Origin of prohibition	571
7.	Origin of certiorari	572
8.	Origin of quo warranto	573
9.	Origin of habeas corpus	574

CHAPTER II.

PRACTICE AND PLEADINGS.

10.	How and when proceedings begin	577
11.	Demand and refusal	578
12.	Who may be the petitioner	579
13.	Who may be the respondent	581
14.	The alternative writ	583
15.	The answer	583
16.	An ordinary remedy a bar	584
17.	A statutory remedy generally a bar	586
18.	Another remedy must be adequate to be a bar	586
19.	A remedy in equity not a bar	588

SECTION PAGE
20. Discretion of the courts 589
21. The trial 590
22. Costs 591
23. Jurisdiction—King's Bench and the United States Supreme Court 591
24. Same subject—Other federal courts 592
25. Same subject—State courts 592

PART II.

THE REMEDIES IN PARTICULAR.

CHAPTER III.

MANDAMUS.

26. Jurisdiction of federal and state courts 594
27. Against corporations 594
28. Against officers 595
29. Same subject—Federal and state officers 597
30. Same subject—Title to office 597
31. What duties it enforces 598

CHAPTER IV.

PROHIBITION.

32. When issued to a court 600
33. When issued to other tribunals 600

CHAPTER V.

CERTIORARI.

34. Not issued to a common law court 602
35. Other tribunals 603
36. What errors it corrects 604

CHAPTER VI.

QUO WARRANTO.

SECTION		PAGE
37.	Against corporations—Municipal	606
38.	Same subject—Other corporations	607
39.	Franchises and powers	608
40.	Against officers—Public	610
41.	Same subject—Private	611
42.	Same subject—Preliminary proceedings	612
43.	Same subject—Federal and state officers	613
44.	When relief must be in equity	614

CHAPTER VII.

HABEAS CORPUS.

45.	What is custody	615
46.	Jurisdiction of federal and state courts	616
47.	Same subject—Under the Revised Statutes	617
48.	Same subject—Legislative custody	620
49.	The return to the writ	621
50.	Errors in sentence	622
51.	Errors in commitment papers	623
52.	When findings of fact conclusive	623
53.	Suspension of the writ—By the President	624
54.	Same subject—By Congress	625
55.	Same subject—By the states	627

Bibliography 627

LAW OF HABEAS CORPUS

CHAPTER I.

DEFINITION, NATURE AND HISTORY OF THE WRIT.

SECTION		PAGE
1.	Definition	629
2.	Nature of the writ	630
3.	Different forms of habeas corpus	631
4.	History	632

CHAPTER II.

THE RIGHT OF PERSONAL LIBERTY AND ITS LIMITATIONS.

5.	Limitations on the right of personal liberty	633
6.	Same subject	633
7.	Limitations punitive of crime	634
8.	Limitations coercive of duties to the state	635
9.	Limitations executive of duties to the citizen	636
10.	Limitations coercive of private obligation	637
11.	Limitations incident to the relation of husband and wife	637
12.	Limitations incident to the relation of parent and child	638
13.	Limitations incident to the relation of guardian and ward	639
14.	Limitations incident to the relation of master and apprentice	639
15.	Limitations incident to the relation of master and servant	640
16.	Limitations incident to the relation of master and scholar	640
17.	Limitations incident to the relation of principal and special bail	641

CHAPTER III.

ISSUANCE OF THE WRIT—PROCEDURE.

SECTION		PAGE
18.	What constitutes a restraint	642
19.	Imprisonment under unconstitutional statute	642
20.	Imprisonment under void city ordinance	643
21.	Imprisonment in violation of constitutional guaranties	643
22.	Lack or excess of jurisdiction and mere error	644
23.	Particular examples of legal and illegal detention	646
24.	Who may apply for the writ	647
25.	Application for the writ	648
26.	The writ	649
27.	The respondent's return	650
28.	The hearing	650
29.	Obedience to the writ	651
30.	Suspension of the writ	652

Bibliography 652

Quiz Questions:

Pleadings in Civil Actions 655
Practice in Civil Actions 675
Law of Equity Pleading 681
Law of Evidence 685
Law of Attachment and Garnishment 695
Law of Judgments and Executions 699
Law of Extraordinary Remedies 705
Law of Habeas Corpus 709

Leading Illustrative Cases, Table of Contents 713

Index 827

PLEADINGS IN CIVIL ACTIONS—AT COMMON LAW AND UNDER MODERN STATUTES

BY

LOUIS B. EWBANK, LL.B.*

CHAPTER I.

NECESSITY OF PLEADING AND IMPORTANCE OF SUBJECT.

1. **Pleadings defined and described.**—The pleadings in an action at law consist of statements, in a logical and legal form, of the facts which constitute the plaintiff's cause of action and the defendant's ground of defense. They comprise (1) a first statement by the plaintiff, which (2) is denied by the defendant as to its truthfulness, or as to its legal sufficiency to give any right of action, or in answer to which the defendant alleges new matter intended to meet and overcome the plaintiff's statement of his action. In case the defendant sets up new matter, (3) the plaintiff is then called upon to overcome it, either by denying its truthfulness or its sufficiency as a defense, or to allege new matter which over-

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comes the allegations of the defendant's answer, and thus supports the plaintiff's original pleading.

Under the practice in some states this is as far as the pleadings may extend, except that the defendant may question the legal sufficiency of the plaintiff's second pleading; the law itself, in those states, presuming a denial of the truthfulness of the allegations in plaintiff's second pleading, or replication. At the common law the plaintiff and the defendant continued to file pleadings, in alternate succession, until one of the parties questioned the truthfulness or the legal sufficiency of the other party's last pleading, or expressly denied some fact averred by his adversary. If the defendant has a cause of action against the plaintiff he may sometimes bring a cross-action in the same proceeding by way of set-off or counterclaim.

2. **Necessity for use of pleadings in presenting case in court.**—In the decision of all controversies between human beings, it is necessary that the nature and the extent of the controversy shall be stated and determined before any intelligent investigation and the determination of the case can be made. This holds true even with students in a debating society; for unless the subject be definitely and accurately stated, the students may merely wrangle over unimportant and immaterial matters, and after the contest and decision nothing satisfactory to any of the participants will have been attained. Far more important than the matter of definitely and accurately stating the subject of a debate is the matter of having definite and accurate pleadings in

the settlement of controversies of sufficient importance to require their decision by tribunals organized and supported by the state; for the pleadings in an action in a court determine the evidence which may be introduced at the trial and the scope of the judgment to be rendered by the court.

3. **Importance of knowledge of the subject of pleading.**—But the difficulty of securing accurate and definite pleadings in the trial of actions in courts has always been one of the great problems in the administration of justice. The courts and the law-making power have sought in many ways to correct the evils incident to poor pleading, but they have never succeeded in formulating rules whereby a lawyer, ignorant of the rules and statutes governing this important branch of the law, can properly prepare a cause for trial and decision by a court.[1]

4. **Disregard of rules of pleading works hardship.**—All rules laid down for the conduct of human affairs will work occasional hardship, and the rules of pleading are no exception in this respect. The reader must therefore keep in mind that the hardship which may sometimes appear in the application of any rule of pleading is but an incident of the endeavor by the courts and legislators to escape the possible evil consequences which would result from the lack of that rule. The reader should also remember that laxity of rules is productive of even more injustice than severity of rules. He should keep in mind that indolence and ignorance will fail to comply with any established order of affairs, and

[1] McFaul v. Ramsey, 20 How. 523 (U. S.), LEADING ILLUSTRATIVE CASES.

that most of the failures of justice incident to the enforcement of the rules of pleading are traceable directly to indolence and ignorance.

5. **Rules should be strictly complied with.**—The courts and the lawmaking powers have been attempting for hundreds of years to formulate rules of pleading which will result in presenting a definite issue for trial without working a hardship upon the party failing properly to prepare his pleading. Though the established rules have been changed and modified, indolence and ignorance have always crowded the line of non-compliance, and the less that has been required the less effort has been made to meet the requirements, so that it appears from examining the decisions on pleading that the states allowing the greatest laxity in pleading have as many or more cases where injustice is traceable to violations of the law of pleading than those states which require a degree of accuracy. Rules cannot be made so loose but that the ignorant and indolent person will violate them. An attorney should learn to comply with the rules of pleading in the courts where he practices, instead of rebelling against them.

6. **Factors which go to make up an action in court.**—In all court proceedings in civil actions there must be at least three separate factors. The first factor is a court. The court must have at least one judge, while it may consist of several judges, a jury, a clerk, a bailiff, and other officers to assist in the decision of controversies and in recording the decisions. The second requisite for a proceeding in court is a person or persons seeking the enforcement

of an alleged right or the redress of an alleged wrong. When this second requisite consists of one person he is called the plaintiff, and when two or more bring or prosecute an action they are called plaintiffs. The third requisite for a proceeding in court may consist either of a person or persons from whom, or of property out of which, the plaintiff seeks redress for an alleged injustice or legal wrong. When this third requisite is one person he is known as the defendant and when it is more than one they are known as defendants; while in a case where the proceeding is against property, it is called the res, or thing, to which liability attaches.

7. **Systems of pleading used in different courts.**— Every government which has achieved any stability has established courts. These courts have sought to protect and restore the rights and to redress the wrongs of persons within their jurisdictions. All these countries and their courts have to some extent developed systems of pleading whereby it has been sought to have the matters in dispute so stated that the statements might be either proved and established or disproved and overthrown by evidence. In some countries more than one form of pleading has been used. In England, for instance, there were three forms of civil pleadings. One of these forms of pleadings was used in the common law courts, another was used in the equity courts, while a third was used in the ecclesiastical (church) courts.

8. **Common law rules as modified by statute.**— The pleadings filed and used in the English courts at this time and in the various courts of this country

in civil cases are all descended from those of the two English courts first named in the preceding section, the English common law courts and the English courts of equity. The ancient rules of pleading used in those English courts control the pleadings in our courts in all matters not specially changed or modified by statute. But, although they have some controlling force in our courts, they are not fully in force in any modern courts either in this country or in England. But such rules, and especially the common law rules of pleading, while no longer in full force, are of great importance to the lawyer of today by reason of being the basis upon which all of our systems of pleadings are founded.[2] For while the statutes modify the common law to some extent, the common law modifies and colors the statutes made in modifying it. It is therefore necessary to have a general understanding of all the rules governing common law pleading, and a particular knowledge of all those rules which have not been changed or modified by special statutory enactment.

9. **Original writs.**—The ancient common law pleading, when first practiced, was entirely oral, and was written down by the clerk upon the issue roll as the facts relied upon were declared by the attorneys for the several parties. This practice of oral pleading has long since been superseded by written pleadings filed on behalf of the parties, but it has been declared in several states that oral pleadings are still allowable where not forbidden by statute.[3]

[2] McFaul v. Ramsey, 20 How. 523 (U. S.), LEADING ILLUSTRATIVE CASES.
[3] 31 Cyclopedia of Pleading and Practice, p. 45.

The common law depended to a great extent upon the form of the pleading as governing its sufficiency. This was partly due to the fact that under the earliest procedure a person seeking to enforce a right or obtain redress for a wrong could not proceed in a court (the administration of justice being one of the powers of the king), without first obtaining a writing in the name of the king, called an original writ, authorizing the suit. After the plaintiff had obtained this original writ it became his authority for the suit, and he could not depart from its form and continue to claim any authority for the prosecution of the suit.

10. **Consequences of suing out the wrong writ.**—The lawyers of those times were much like the lawyers of today. Some were shrewd and diligent, and some were indolent and dull of comprehension. As a result many meritorious actions were lost because the plaintiff's attorney chose a writ which did not authorize a recovery for the particular wrong of which the plaintiff complained. And since the writ was a license only to recover for one kind of wrong, the plaintiff was denied all relief when he failed to show himself entitled to recover on that account, whatever he might have been able to recover under a different writ, if his attorney had obtained the proper one.

11. **Definition of action at law as distinguished from suit in equity.**—A proceeding in a common law court in England was known as an action, while proceedings in the equity courts, "courts of chancery," as they were called, were known as suits.

Lord Coke (one of the noted English judges of the time of Queen Elizabeth), defined an action at law as being "nothing less than the lawful demand of one's right," and again as "nothing less than the right of pursuing in a court of justice that which is due one." In this country, in states and courts where the distinctions in form between the common law and equity pleadings are still maintained under practice acts, the lawyers still speak of actions in referring to common law cases, while they speak of proceedings on the equity side of the court as suits. In states that have adopted the code system of pleading (which combines some of the equity rules and statutory provisions with the common law rules of pleading), the lawyers use the words "action" and "suit" interchangeably, though they understand the difference in their accurate use. In this work only the word "action" will be used.

12. **Classification of actions.**—Actions are divided, in respect to the subject matter of the controversy, into three classes: first, real actions, involving the title or possession of real estate; second, personal actions, involving the title or possession of personal property, or the recovery of a money judgment against the defendant; and third, mixed actions, involving the title or possession of real estate, and also the recovery of a judgment for damages. Actions are also divided into two classes with relation to the nature of the wrong complained of, being: first, actions growing out of contracts; and second, actions for torts or wrongs, the word "tort" meaning wrong. A plaintiff may sometimes waive

the tort, and sue upon contract where he has a right of action in tort, but he may never sue in tort for a mere non-performance of a contract. These different forms of actions will be considered later.

13. **Importance of a study of the statutes in relation to pleading.**—For the practice of law in any particular state the reader should study the statutes of such state and the decisions construing those statutes, in connection with any general work on the law of pleading. Even a lawyer who has practiced law for many years in one state will not attempt to draft a pleading for use in another state without some examination of the statutory requirements on the subject in the jurisdiction where the pleading is to be used.

14. **Subject of pleading not unreasonably difficult.**—The reader should approach the subject of pleading in a cheerful and hopeful state of mind, for the law of pleading can easily be comprehended by any person possessed of a logical mind capable of developing any great legal capacity. The reader who will enter upon the study of this subject with confidence in himself and confidence in the intelligence of the learned judges and legislators who formulated and established the rules of pleading, will reach a fair comprehension of the subject from careful reading. But experience in preparing pleadings, and the study of the pleadings actually used in a case in court will be of advantage as an aid in understanding the terms used in the text.

CHAPTER II.

HISTORY OF COURTS AND PLEADING.

15. **Description of ancient English courts.**—During the early history of England the inhabitants were largely dependent upon inferior courts, which were partly under the control of persons having authority in each neighborhood. The lowest and smallest of these courts was known as the court of piepoudre, curia pedis pulverizati (court of dusty feet; i. e. wayside court), and was little more than a neighborhood gathering; the next was the court baron, and the next the hundred-court; while above this was the shire or county court. These courts were largely under the control of the principal man of that division of the community where they were established, who was often interested in the litigation which was before the court. William the First (or William the Conqueror, as he is sometimes called) established courts of the king for the purpose of dispensing justice and collecting a certain amount of revenue from the litigating parties. These courts were the Court of the King's Bench, the Court of Common Pleas, and the Court of the Exchequer.[4] Each of these three courts had at first a certain jurisdiction which was different from the jurisdiction of each of the other courts; but each in its endeavor to expand its jurisdiction took over any case in which there was an

[4] 4 Blackstone, Commentaries (Cooley 2nd ed.), * pp. 30-60.

element of its jurisdiction, and by the use of fictions relative to conditions took cases that really contained no element of such jurisdiction until the three courts came to have concurrent jurisdiction in a large measure, especially over the cases which originally belonged to the court of common pleas. There was in the government of England an officer known as the chancellor, and he issued the writs or permits to sue to the persons who desired to bring an action in any of the king's courts.

The chancellor himself held a court where he gave relief to those who could not obtain it by using the simple forms of the common law, and this court was known as the court of chancery. These early courts of the king originally followed the king in his various trips when he traveled about over England, as he was the one supposed to give relief to the wronged subject. King John abused his privileges in thus moving the court, and the Magna Charta provided that the court should be held at a definite place, and it was established at Westminster, since which time the places of holding courts have been certain, though one judge may hold the court in several different places on a circuit. The courts held on the circuits in England were called nisi prius courts, and sat for the purpose of filing pleadings, examining witnesses, and conducting trials by jury.

16. **Chancellor's power to issue writs and to grant equitable relief.**—The chancellor was supposed to keep the king's conscience and to exercise the king's authority in granting relief to a wronged suitor, where there was no adequate provision in the com-

mon law for giving relief. The chancellor rendered decisions on his own judgment without having to call a jury, and gave a personal decree ordering the person guilty of a wrong to do or not to do certain acts. The original writ was at first issued by the chancellor, and later issued out of the court of chancery, as the chancellor sitting in the court of chancery was held more directly to represent the king. When a subject felt himself wronged in such a manner that the common law courts could not furnish adequate relief he would petition the chancellor in his court, as the direct representative of the king, and pray him to grant the relief which justice demanded. The chancellor and his court, acting directly for the king, required no authority from the king to award relief, so that no original writ was required. The court of chancery would not entertain a suit where it appeared that there was an adequate remedy at common law, for a subject could not expect extraordinary relief when there was any writ under the common law by which proper relief could be obtained. The petitioner's (plaintiff's) pleading (petition) was addressed to the chancellor, and followed a long form, setting out in detail the injustice suffered by the petitioner, and showing that he was himself without fault and could not have an adequate remedy at common law. In the code states of this country the form of the first pleading in an action resembles an equity petition as nearly as it does a common law declaration, and is a substitute for both. In the other states the equity pleadings are still required to be longer than the common law pleadings. In all states

a person seeking equitable relief must show himself entitled to it under the old maxims of equity practice. But a discussion of equity procedure is beyond the scope of this article, and is properly a part of the article on Equity Pleading. The above is given only for the purpose of enabling the reader better to understand the present court practice. The former practice in the ecclesiastical (church) courts, which had jurisdiction of probate and divorce matters, does not materially affect our practice of today.

17. **Courts established in United States.**—In the United States, most of the states have given jurisdiction over the subjects which were within the jurisdiction of all of these courts, both the common law courts and courts of equity, to local courts, which in different states are called by some distinctive name, as circuit courts or district courts; and in those states where a code has been adopted, the pleadings in all kinds of actions are much the same as to form, though the facts constituting the right of action differ in different cases. In other states practice acts have been adopted, to some extent modifying the common law and equity rules, so that the pleadings in different classes of actions have been modified to resemble each other more nearly. Statutory additions to the rules of pleading and practice have also been made which are intended to aid in the administration of justice. In some states probate, county, and other courts have been established to relieve the circuit courts of some of their burdens.

18. **Kinds of actions maintainable at common law.**—In the early history of England a person who

believed he had a right of action against another was compelled to pay for the right of bringing an action, the same as a person is now required to take out a license before he may lawfully do certain acts, such as running an automobile or driving a bus. As authority for bringing the action he was given a written parchment, which was called an original writ. This writ was his authority from the king to prosecute the action in the king's court. In those early days the people were simple in their habits and rough in manners, and not over-sensitive in their feelings, while there was but little property except land, crops, buildings, farm animals, and other property connected with the land. As the times were unsettled, commercial transactions were few and of simple and primitive kinds, and the few actions brought were to recover specific tracts of land, specific articles of personal property or domestic animals, or damages for injury to persons or property, or actions upon the small contracts incident to the simple life. Among such primitive people with little property, it required but a few simple actions to dispose of their controversies. By reason of these facts, the most ancient writs provided only for the most obvious kinds of wrongs; but, in the progress of society, cases of injury arose that were new in their circumstances, and were not reached by any of the writs known in practice. But after the law clerks had issued these few original writs for a number of years, they were reluctant to issue any writ other than the old ones in common use. To remedy this lack of writs, Parliament, in the reign of Edward I,

passed an act requiring the law clerks to formulate new writs where no old writ would warrant the court in giving a remedy for the wrong. This statute gave rise to the writ and action of trespass on the case. Since that time this action has been developed, and is now much used in cases where the facts which constitute a cause of action do not come within the scope of any of the old writs.

19. **Importance of choice of proper writ.**—The original writ being the sole authority for bringing or maintaining the action at common law, an original writ for redress in one kind of action could never be authority for maintaining an action of another kind, or for obtaining the relief incident to a different kind of action. When the plaintiff began his action upon the wrong kind of writ, the evidence would not sustain it, and the only possible result was a failure of the action. Some of the distinctions developed by the courts as existing between the different kinds of writs were the result of false reasoning, and the distinctions became distorted by the hair-splitting reasoning sometimes used by the courts. By reason of these facts it was sometimes difficult for the plaintiff's attorney to determine what was the proper writ for a contemplated action. This resulted in many failures of justice, because of the wrong writ being chosen and actions failing for that reason. Original writs have long since been abolished and are not now used, either in this country or England. Though the use of the original writ was abolished many years ago, the plaintiff was, for many years, compelled to word his pleading after the forms of the

old original writs, as the language of the writs had acquired a legal meaning far broader than its grammatical meaning. Where the plaintiff did not follow the proper and established form, his pleading was held insufficient. It is still a rule of good pleading that where words have an exact established legal meaning they should be used, and the pleader should not attempt to substitute words of his own in their stead. But this rule will be considered in a subsequent section.

20. **Statutes remedying abuses of the rules of pleading.**—Some of the old common law courts carried the rule of insisting upon forms to such an extent that it became distasteful to the people, and numerous corrective statutes have been passed in England and in the several states of this country to overcome the severity of the rule. The first of these remedial statutes was passed in the time of Edward III of England, and forbade attacking the mere form of a pleading, after a trial and a verdict by the court or jury, by the use of what is called a motion in arrest of judgment. There have been numerous corrective statutes since that time which have attempted to overcome the abuses in pleading as they were developed in practice before the courts.

CHAPTER III.

COURSE OF AN ACTION.

21. **Obtaining knowledge of facts and preparing declaration.**—An attorney who contemplates bringing an action must first obtain all of the available facts tending to influence the right of action, as a slight difference in the facts may entirely change the nature of the relief to which his client is entitled. He should then fully investigate the law governing actions of the class to which he believes that action belongs, to determine if there are any difficulties in the way of maintaining the form of action contemplated, and obtaining the benefit of that particular remedy. After he has the facts fully marshalled and the law applicable to them well in hand, he is then ready to draft his first pleading, which, under the common law, is called the declaration. In some states it is called the complaint, and in other states it is called the plaintiff's statement, while in equity practice it is known as the petition.

22. **Process to bring defendants into court.**—The attorney must determine who shall be named as plaintiffs and who as defendants (which subject will be considered later), and must also see that all the defendants are properly brought into court by the service of lawful notice or by voluntary appearance. In some of the states the plaintiff must file his first pleading (declaration or complaint) before any no-

tice may be issued for the defendant, while in other states the plaintiff may file a notice of the nature of his action, and request the court to issue process commanding the defendant to appear, which process is usually called a summons. The method of beginning an action is regulated by statute in all the states.

Upon the filing by the plaintiff of his declaration or notice and his request for process, the court will summon the defendant to appear and answer plaintiff's claim. Unless the action is by way of attachment or replevin, or other effort to reach or to affect certain property within the court's jurisdiction, or is to obtain a divorce, or otherwise to affect the status of the plaintiff, the defendant must be personally served with summons, to give the court jurisdiction over his person, before the court may render a judgment affecting the rights of the defendant in the action. This service of summons is made by the sheriff or other proper court officer upon each of the defendants. If any of the defendants are not within the jurisdiction of the court, and the action is to affect their property in the possession of the court, or is otherwise an action in which the court may enter a valid judgment without rendering any personal judgment against these defendants, the statutes of the different states provide for the publication of notice. This usually involves the posting of the notice in certain conspicuous places or publishing it in a newspaper. The statutes also provide how the plaintiff may proceed against only a part of the defendants, where some of them are without the jurisdiction of the court, which is either by dis-

missal as to those not within the jurisdiction, or by publication where their property within the jurisdiction of the court is sought to be affected. This publication of notice will not support a judgment affecting any property of the defendant not proceeded against in that action. In case the defendant has been guilty of fraud or other great wrong named by the statute, or is shown to be about to leave the state to evade the jurisdiction of the court, the plaintiff may have the defendant arrested and brought personally before the court by a summons called a capias ad respondendum (take [the defendant] to respond).

Ordinarily the plaintiff may not proceed by seizing the defendant's property or having him arrested without first showing good cause by affidavit, and complying with such other safeguards of property and liberty as the statutes of the state provide. But the necessity for an affidavit showing cause, in order to procure the arrest of the defendant in a civil action, is created wholly by the statutes in force in the different jurisdictions.

23. **Form and substance required in pleadings.**— Under the common law and in states where the form of the pleading is material, an attorney should be careful to follow the established forms as nearly as possible. Never substitute other language for that which has an exact legal meaning. If the pleading is under the code adopted by a state, or under a practice act of a state which abolishes the use of forms, the attorney for the plaintiff, in drawing his first pleading, should be very careful to state by

positive averment every material fact essential to a cause of action of the kind to which his action belongs. He should also be careful to state facts under which all of the evidence by which he intends to support his action may be sustained. If the attorney, in preparing an answer or a replication, is seeking to overcome a former pleading by a denial of its allegations, he should be careful that the denial is sufficiently exact and broad enough to overcome the allegations of the pleading he is seeking to meet. If he is seeking to overcome a former pleading by alleging new matter, he should be sure that it fully meets the allegations in that former pleading (unless it is filed as a partial answer). Good pleading under any form requires that the allegations of the plaintiff's first pleading shall show a cause of action, and that any after-pleading of new matter shall entirely overcome the former pleading, unless pleaded only as a partial answer to that pleading.

24. **All the essentials of a pleading must be stated.**—The failure to state one essential element of the plaintiff's right of action will make his pleading insufficient; and as completely insufficient as a failure of the cook to use one of the essential elements of a baking will prevent the product from being the intended article of food, or as the failure to weld one link of a chain will make the chain a weak and inoperative appliance. The essential statements should be made in a positive and exact manner, complying with the rules of pleading hereafter given, and with any provisions of the statutes of the state where the action is brought.

25. **Pleadings which defendant may use.**—After the plaintiff has filed his pleading and the defendant has been summoned to appear, the defendant must set up his defense to the action. This defense may be either: (1) a dilatory plea, showing that the particular action cannot be maintained in the manner in which it is brought; (2) a demurrer to the plaintiff's pleading because it shows upon its face that plaintiff cannot maintain the action in the manner in which it is brought; or (3) a plea (or answer) setting up a defense to the action, and stating why the plaintiff cannot recover, which is called pleading to the merits of the action.

26. **Dilatory pleas by the defendant.**—Dilatory pleas are of three classes: (1) pleas to the jurisdiction of the court; (2) pleas in suspension of the action; and (3) pleas in abatement of the action. A defendant wishing to use more than one of these dilatory pleas should be careful to use them in the order in which they are named, for a pleader may no more use a defense which he has passed, after making use of the next in order, than a passenger on a train can alight at a station which he has passed, after remaining upon the train to reach a station farther on. The pleader may not call upon the court to determine the sufficiency of allegations in a plea in abatement, and afterward question the fact that he is before the court, nor in any other manner recognize the existence of a fact and then deny it. If the jurisdiction is to be denied by a plea in abatement it must be the defendant's first plea. Dilatory pleas, being an evasion of the charge of wrong and

injustice contained in the plaintiff's pleading, are not favored by the courts, nor are they upheld unless they present the facts alleged in such a manner that the court cannot escape upholding them. The form and matter of dilatory pleas will be discussed later.

27. **Demurrer to the declaration may be presented.**—If the defendant sees no opportunity to prevent the prosecution of the action, as by denying the jurisdiction or pleading in abatement, his next consideration is the sufficiency of the plaintiff's pleading. The law does not compel a defendant to be at the trouble and expense of a trial to determine the facts of an action until a sufficient pleading has been filed against him by the plaintiff. If the plaintiff has an erroneous conception of the law, but is fair in his presentation of the facts, the defendant may obtain a ruling by the court upon the facts stated in the declaration by filing a demurrer to it. Under the early practice a decision upon a demurrer was decisive of the merits of the action. The present practice is to allow amendments of the defective pleading by the party filing it, or to allow the party who files a demurrer which is overruled then to answer the pleading on its merits. This presents a condition which requires a consideration of all the possible after-results, in determining whether or not the defendant shall file a demurrer, or answer the defective pleading and go to trial upon it. Gaining a ruling with respect to a pleading which merely serves to educate the opposing party may only prepare him for a stronger fight at the trial, and lessen the chance of a final judgment in favor of the party

demurring. A demurrer reaches only those legal defects in a pleading which are apparent upon its face. It does not reach the defect of uncertainty, if the broad, general allegations of fact state grounds for an action, though not with sufficient certainty and particularity properly to apprise the defendant of the exact facts on which the action is based; a motion to make more specific, and not a demurrer, being the remedy for such a defect. The demurrer, as before stated, only questions the legal sufficiency of the matters stated, to support the action. A demurrer does not question the truthfulness of any statements of alleged facts, the ruling being made on the theory that they are all true, and a judgment overruling a demurrer is a decision that the matters alleged, if true in fact, are sufficient in law. This subject will be considered at length in later sections.

28. **Motion to make pleading more specific.**—If the defendant has filed one or more of the dilatory pleas and the demurrer, or any or all of them, but the court decides against him, or if he has waived the right to file any or all of them, he may still, in many states, question the sufficiency of the pleading, declaration, or complaint, by a motion. This motion may ask the court to require that the facts be stated in a more definite manner, to inform the defendant better of the exact nature of the charge which he is required to meet, or to require that the plaintiff shall otherwise make his pleading more accurate so as to conform to the rules of good pleading.

In jurisdictions where the question of form is still important, a defect of form is generally reached by a

special demurrer. Whether the matter is one which is reached by a demurrer or by a motion, the question, shall the defendant use or shall he not use this means of correction, when it is available, raises another question—will such a demurrer or motion be the means of gaining greater information for himself and restricting the plaintiff on the trial, or will it merely aid the plaintiff and help to enlighten him on a matter of which he is ignorant, by calling attention to the essential points in his case, and will it thus enable him to present a stronger cause for the defendant to overcome. If facts exist which are not sufficiently alleged and are fully known to the defendant, unless they are favorable to him, nothing can ordinarily be gained by calling attention to their omission by a demurrer or motion. The use of motions or other means whereby the adverse party's pleadings are corrected is largely a matter of discretion, resting in the sound judgment of the attorney having the right to use them. But a good attorney will never force his client to strengthen the opposing side of the cause for any glory incident to a mere ruling in his favor which is not helpful to the ultimate winning of a final judgment in favor of his client. Each opportunity for the correction of the other party's pleadings presents many conflicting factors which must be weighed in the light of existing circumstances, and a decision reached by the attorney having the right to demand a correction. It is a case for the exercise of discretion which may be influenced by rules, but must finally rest on practical common sense.

29. **Plea of defendant, stating his cause of defense.**—If the defendant waives his right to file a dilatory plea or a demurrer, or if he does file either or both of them and they are overruled (and he does not wish to let judgment be rendered against him on the ruling for purposes of an appeal, and no additional remedy by motion is desired), the defendant is then required to plead to the merits of the plaintiff's alleged action. This pleading at common law was called the plea, and in the equity practice and under most of the codes it is called the answer, while in jurisdictions where the pleadings are required to be sworn to, it is sometimes called an affidavit of defense or affidavit of merits. This statement of his defense by the defendant may consist either of a denial of the facts alleged, as constituting the plaintiff's cause of action, or allegations of such new matter as the defendant believes will overcome the facts alleged in the plaintiff's pleading.

During the period covered by the early English cases the defendant was permitted to rely upon but one defense. He might either deny that the facts giving a right of action ever existed, or confess that the right of action once existed and then set up such new matter as he believed overcame it; but he could not both deny the cause of action and also confess and avoid it. Afterward the defendant was given the right, by statute, in some jurisdictions, to file a plea containing several paragraphs, each of which stated a separate defense. He could in one paragraph deny that the cause of action ever existed, and at the same time, in other paragraphs, confess

that a liability once existed, but state facts showing that all liability had ceased to exist; but he could not mix his confessions and denials. Each paragraph was required to be plainly a denial or a confession and avoidance, and when the defendant attempted to avoid by the allegation of new matter, he must at least give color to the allegations of the plaintiff's pleading. This is now the law in many jurisdictions. In many of the states there are express statutes providing that the defendant, in the same paragraph, may deny part of the allegations of the plaintiff's pleading and allege new matter to overcome other allegations. A few jurisdictions permit only a single statement of the defense, which must be sworn to. Where the defendant files more than one paragraph undertaking to state his cause of defense, each paragraph must state a sufficient defense standing alone. It cannot in any way depend for support upon another paragraph.[5]

30. **Replication and formation of issue.**—After the defendant has filed his first plea to the merits of the action, the plaintiff may either demur to it, or file a motion to strike it out, or to make it more specific, or may otherwise correct it under the same rules that the defendant can question the sufficiency of the plaintiff's first pleading. If the plaintiff either waives or exhausts these privileges without disposing of the defendant's pleading, he must then meet, by a replication, any new matter alleged in any paragraph thereof. This replication is governed by the same rules which govern the defendant in

[5] Considered in Chap. VIII.

preparing his defense to the merits of the plaintiff's first pleading. The plaintiff in his reply may either deny or avoid, or he may deny and avoid, under the same rules governing the defendant in pleading. In many states of this country, the reply is the last pleading allowed, and the law presumes a denial by the defendant of all the new matter contained in the reply. At common law the defendant might file a pleading called a rejoinder, and the plaintiff a sur-rejoinder, the defendant a rebutter, the plaintiff a sur-rebutter, and such alternate pleadings thereafter as were required to reach either a denial of the facts alleged in the last pleading, or a challenge of its legal sufficiency. The number of pleadings allowed is governed by the statutes of the state where the action is brought. The original common law rule contemplated all of the former pleadings as merely the course by which the parties reached an issue upon the final pleading; but under the modern practice the issue is ordinarily broader than merely one particular fact, as contemplated by the early common law, and two or more issues are often joined in the same action and tried together.

31. **Issues—Their effect and importance.**—The parties having answered the pleadings of each other until they have reached an issue, by which it has been determined what the one party alleges and the other denies, either as to its truth or its sufficiency in law to support the action or defense, the cause is ready for trial. If the issue is an issue of law on demurrer, it is submitted to the court immediately, by force of the demurrer, and the court rules upon

the demurrer at such time as he chooses, either immediately or at a later date, to suit his convenience. The party defeated by the ruling is given the right to amend, but also has the right to stand upon the ruling on the demurrer, and to let judgment go against him in that court, and, by appeal or writ of error to a higher court, to question the first court's decision.

If the issue is joined upon a denial of one or more facts pleaded by either or both of the parties, the pleadings and the issues become very important, for they control the evidence which may be admitted to support or overcome the allegations of such pleadings or issues of fact. After judgment is rendered in the action, whether it be on demurrer or on the trial of issues of fact (whether the trial of facts is before the judge or a jury), the pleadings become important as determining what was decided in the action, since the law will presume that all things were litigated and decided which could be determined under the issues formed in the case.

32. **Motions in arrest of judgment.**—After the trial of an action on an issue of fact, the defeated party has the right to file a motion for a new trial for certain causes, which are ordinarily the causes specified by a statute of the state. Even though no error in the trial or decision of the action amounts to cause for granting a new trial, the defeated party may move in arrest of judgment. This motion can only be sustained where the pleadings will not support a judgment against the party moving in arrest of judgment. Such a motion is not

favored, and where the defendant has gone to trial and there is a finding against him, the motion will be overruled and judgment will be rendered against him on the finding, unless the complaint is very defective. In many states the rule is that if the complaint is sufficient to bar another action for the same cause the motion must be overruled. But the fact that it is sometimes sustained in all states shows the necessity for good pleadings, and also shows that some attorneys are negligent in presenting poor pleadings.

33. **Principal examples of pleadings to be used as aids.**—In the preceding sections the history, the use, and the necessity of pleadings have been discussed, and the course of an action from its commencement until the judgment by the trial court has been taken up in a general way. These matters have been thus presented that the reader may by this means more readily get the right point of view in studying the rules governing the science of good pleading. In the following sections it will be the aim to give the more essential rules governing both common law and code pleading. The subject of common law pleading will be first discussed, and the more prominent characteristics of the various actions recognized by the common law shown. The reader will find great profit in the study of the subject of pleading by going to the court house of his county, and asking the clerk of the court for permission to read some of the pleadings filed, especially in cases where he is acquainted with the circumstances and the facts. Observe the different degrees of care and ac-

curacy of expression employed by the careful attorneys in the different cases. If some of the cases examined are suits in equity, while others are simple common law actions, the reader should observe the greater length of the pleadings in the equity cases, not only in states using a modified form of common law pleading, but also in the states governed by codes. The reports of decisions of the courts having appellate jurisdiction in all of the states set out pleadings which have been challenged by demurrers, with the suggestions of counsel as to what each pleading lacks of being sufficient, and the decision of the courts as to which of the objections are well founded, stating the reasons. The student may spend a few hours profitably reading some of the cases appealed from his own county by lawyers with whom he is acquainted, in which questions of pleading were involved.

CHAPTER IV.

COMMON LAW CAUSES OF ACTION.

34. **Real actions.**—At common law there were five real actions;[6] but some of these ceased to exist many years ago and others were of such nature that they could be of no interest in our country, as one depends upon an established church and others were for different reasons unsuited to our laws and usages. Only one of these five real actions is recognized in the United States, and that in a modern form. This is the action by writ of entry, and it exists in a few states where the old action, greatly modified, is recognized only as a mixed action in which damages may be recovered with the recovery of the land. The action of writ of entry involves both the title and the possession of the land and cannot be maintained upon an equitable title. There must also have been a disseisin of the plaintiff or the person under whom he claims. The action is little used now, but is the remnant of one of the most frequently used of the early common law actions.

35. **Personal actions — Classification.**—Personal actions are those brought for the recovery of specific personal property, or the recovery of a debt, or for damages for the breach of a contract, or for the injury to a person or property. At common law there

[6] 3 Blackstone, Commentaries (Cooley's 2nd ed.), Ch. X, * pp. 167-197.

were nine forms of personal actions (counting the action of trespass on the case, which was especially recognized by an early statute).[7] Each of these actions required its own particular state of facts to support it, and each of them furnished its own peculiar relief. These personal actions were divided into two classes, one class being actions on contract, and the other on torts. The first class, actions on contracts, embraced four separate forms of actions, as follows: (1) assumpsit; (2) covenant; (3) debt; (4) account. In some of these actions, as will be shown, an express contract was not absolutely necessary, but might be presumed from the circumstances of the case.

The second class, actions for torts, embraced five separate actions, as follows: (1) trespass; (2) trover; (3) trespass on the case (commonly called case); (4) detinue; (5) replevin. These several actions will be considered in the order named, first considering the personal actions on contract in their proper and logical order.

36. **Personal actions on contract.**—As has been seen, the personal actions on contract were assumpsit, covenant, debt, and account. Some of the most prominent characteristics of each of these actions will now be considered. The action of assumpsit in most states lies for damages for the breach of any contract not under seal. The contract may be written or oral; at common law any contract without a seal being known as a parol contract. At common law,

[7] 3 Blackstone, Commentaries (Cooley's 2nd ed.) Chs. VIII, IX, * pp. 115-165.

when a party affixes his seal to a contract the solemnity of the act transforms the contract into a specialty, and the promise into a covenant. When the action is on an instrument under seal the form of the action must be either covenant or debt. In some states the distinction between instruments under seal and without seal is still maintained, while in some of the states a seal does not change the character of the contract. Assumpsit is the proper action on an unsealed contract, whether the contract is oral or written, express or implied. It lies on any contract, whether for the payment of money, the delivery of goods, or the performance or forbearance of an act. This form of action is the only immediate remedy where the defendant has failed to pay one installment due on a contract which has not all matured, unless each installment is provided for by a distinct promise, as in the case of rent; that is, unless the undertaking to pay each installment is really a promise to pay a distinct sum on a day certain. The action will never lie unless there is an actual contract, or a contract can be implied by law. But where the law will imply a contract, either as a matter of law or by reason of the facts in the case, the action of assumpsit is a proper remedy.

37. **Assumpsit.**—The action of assumpsit is itself divided into two classes, special assumpsit and general assumpsit. Each of these two classes has qualities which make it peculiarly suited for use in actions of its class. Special assumpsit lies where the action is brought on a definite contract. It is based upon an express promise and will lie where an ex-

press promise can be shown. General assumpsit, on the other hand, lies where the plaintiff declares generally, as for a pecuniary demand founded on an executed consideration. The basis of the action of general assumpsit is the promise implied by law from the legal duty resting upon the defendant by reason of the acceptance of the consideration. Such a promise is implied by the law: (1) where the law presumes its existence as a fact by reason of the defendant's past behavior, either because of acts done by the defendant or permitted to be done by him, and which warrant an inference that an agreement actually existed; (2) where the law raises a promise as a legal presumption by reason of a legal obligation resting on the defendant. The law will not permit a person who has taken the property of another without any right to deny that he intended to pay for it, and therefore impliedly promised to pay for it. Whenever a plaintiff sues in assumpsit, where property was wrongly taken, it is called waiving the tort and suing in assumpsit. In any case where the defendant has accepted or taken the benefit of plaintiff's property or services under such circumstances that he ought to have promised to pay for the property or benefit, the law will imply that he did promise to pay. General assumpsit also lies where an action is for the recovery of a sum given by statute, by reason of the acts of the defendant. The defendant cannot deny that he promised to pay that which the law requires him to pay.[8]

[8] Metcalf v. Robinson, 2 McLean 363 (U. S.), LEADING ILLUSTRATIVE CASES.

38. **Assumpsit—Special contract partly performed.**—As a general rule a person cannot sue upon a special promise in general assumpsit. But each of the following conditions are exceptions to this general rule, the exceptions being for the promotion of justice: (1) Where the contract has been fully executed by the plaintiff and the payment by the defendant is all that remains to be done, general assumpsit will lie. (2) If the special contract is unenforcible by reason of lack of form or other lack of due execution (so that it cannot be enforced as a written special contract, but is not illegal), and the defendant has accepted benefits under this unenforcible contract, the plaintiff may recover in general assumpsit for the benefit accepted by the defendant. (This also holds true in some cases where the contract was voidable, even though rescinded by the plaintiff.) This exception to the rule was illustrated where the plaintiff was a minor when he made a contract to perform services, and after he had performed part of the services, which defendant accepted, the plaintiff rescinded the contract, and recovered in general assumpsit for the portion of the services which the defendant had accepted.[9] (3) Where the plaintiff has partly performed his contract and the defendant prevents its completion, or its completion is prevented by some act of an overpowering force, or by law, in such a way as to excuse the plaintiff from its completion, general assumpsit will lie. (4) Where the plaintiff has performed the special contract, and has also done additional acts or

[9] Moses v. Stevens, 2 Pick. 332 (Mass.).

furnished additional goods at defendant's request, general assumpsit lies for the additional work or goods. (5) In a few states, where the plaintiff has acted in good faith, he can recover on general assumpsit for the work done on a partially performed contract.

There are numerous close distinctions as to the use of this writ, or the writ of debt, as to whether to sue on special or general assumpsit, but in a close case the lawyer will always make a rigid investigation of the law applying to his particular facts, especially the decisions of his own state. The above will be sufficient to determine all but the close cases.

39. **Covenant.**—The action of covenant lies for the breach of a contract under seal, signed by the defendant, whether the damages are liquidated or unliquidated. When the damages are liquidated the plaintiff may bring his action either in debt or in covenant. When the damages are unliquidated the plaintiff has but the one remedy of covenant. Damages are liquidated when their amount is certain and fixed by the terms of the contract. When the amount of the damages is uncertain and must be proved by evidence, they are unliquidated. The action of covenant cannot be maintained where the instrument is signed only by the plaintiff, as for the purchase money due for land conveyed under seal. In that case the action must be in assumpsit. To support the action of covenant there must have been a promise by the defendant under the defendant's seal.

40. **Debt.**—The action of debt lies where the plaintiff seeks to recover a definite sum of money

due him from the defendant.[10] The sum must be definite and certain, as debt can never be maintained for the recovery of unliquidated damages. Debt will lie on any contract where the sum recoverable is definite and certain, whether the contract is written or unwritten, under seal or parol. Debt will also lie on a judgment, an award of arbitration, a penalty recoverable under a statute, or any other obligation to pay money where the amount to be recovered is certain and there is a promise, or the law will imply a promise to pay a definite sum. Where a contract is payable by installments the ordinary and general rule is that there can be but one action, after the whole amount has become due, upon default of all the payments. This general rule does not apply where the delinquent installment is a definite sum due on a day certain, as the payment of rent, or other contract where each payment is of a certain sum on a day certain. In other cases of the default of installments of a contract where the whole amount is not yet due, assumpsit, and not debt, is the proper remedy to enforce payment.

41. **Account.**—The action of account lies to recover the balance due where the defendant has received goods or money from another. This action lies to obtain an accounting between the parties and to recover the balance due, where the amount is uncertain and unliquidated. The action may be maintained on either an express or an implied promise. The action is also known as account rendered. This

[10] United States v. Colt, Peters C. C. 145 (U. S.), LEADING ILLUSTRATIVE CASES.

action is supplemental to the action of assumpsit where the amount is unliquidated, so that debt will not lie, as debt is supplemental to assumpsit and covenant, where the amount due is certain. The action of account is not now used to any great extent, as the plaintiff usually makes use of the action of assumpsit, or brings a suit for an accounting in a court of equity, if the action of assumpsit will not furnish complete relief.

The preceding four common law actions are the personal actions on contract now in use. The student should always investigate the statutes and decisions of his own state to see if any of the common law provisions are either supplemented or modified by those statutes.

42. **Torts — Classification—Exemptions.**— There are, as already stated, five common law actions for torts. These actions are: (1) trespass; (2) trover; (3) trespass on the case; (4) detinue; and (5) replevin. These actions will now be considered in the order in which they are named. Some of the main differences between actions in tort and actions on contracts will first be briefly discussed, with some of the characteristics of each. In the first place it must be remembered that an action on contract does not necessarily imply any wrong intent or even any positive wrongdoing on the part of the defendant. The defendant may have made the promise with the best of intentions, and used his utmost efforts to comply with its terms, and failed only by reason of his inability. On the other hand, a tort implies that the defendant has damaged another, his property or his

privilege, without right or consent of the damaged person, and that the wrong was either willfully or negligently done. By reason of the difference in the basis of the actions it is sometimes harder to make proof of an action in tort than it would be to make proof of an action of assumpsit. Also, by reason of the different basis of the actions, most of the states distinguish in the relief furnished, especially where the defendant is of small means, as to the rights of exemption and of bankruptcy. Most of the states give a liberal exemption from executions issued on judgments on contracts to their citizens with families. This exemption in some states extends to all citizens, and in some to all householders. There is ordinarily less leniency shown to the judgment debtor who has suffered a judgment in damages for tort. The bankruptcy laws also recognize the difference between judgments which have been recovered on contract and those on tort. For these and other reasons too numerous to mention here, a judgment for tort against a defendant of small means is more valuable than one on contract. The student will obtain a more complete understanding of these differences in his study of the subjects of contracts, torts, judgments and executions. In the study of pleading our chief object is to learn how to obtain a judgment.

43. **Trespass.**—The action of trespass lies to recover damages for an injury sustained by the plaintiff, as the immediate consequence of some wrong done forcibly to his property, person, or rights in relation thereto, by the defendant. The action can

be maintained only where the injury is committed with force, either actual or implied. An assault and battery or the injury of the plaintiff's building or other property by force, are illustrations of actual force. The same rule applies if the injury is done to the plaintiff's servant, or to any of the rights of the plaintiff. Force is implied where the injury is the direct result of a wrongful act, as when a fire is started and as an immediate consequence the plaintiff's property is destroyed or damaged.[11] Force may also be implied where the defendant seduces or entices away the wife, daughter or maidservant of the plaintiff, for the law will imply force even if the act be done with the woman's consent, she having no power to consent to an invasion of the plaintiff's rights; though in that case the suit may be brought either in trespass or trespass on the case. Force is also implied if a person goes upon the land of another ever so peaceably but without right, or in case of false imprisonment without actual force, as by locking the door after plaintiff has been decoyed into a room. The injury must be caused by some act done, for the action will not lie for a mere failure to perform a duty. In short, the action is for a positive wrong and not for a mere neglect to act. The wrong must be to some tangible thing, and cannot be a wrong against an intangible property or right, as a franchise or a mere easement of right of way, against which no force could be exerted.[12] A person who enters a place by right but abuses his privilege be-

[11] Jordan v. Wyatt, 4 Gratt. 151 (Va.); Akerley v. Haines, 2 Caines 292 (N. Y.).

[12] Dietrich v. Berk, 24 Pa. St. 470.

comes a trespasser from the first entry (termed trespass ab initio, i. e., from the beginning), as where an officer serving a lawful writ abuses his authority.[13]

44. **Same subject—Direct force as an element.**—The action of trespass cannot be maintained unless the injury is the direct result of actual or implied force. It cannot be maintained for a mere consequential injury, as where the defendant put a rock in the highway and a traveler was injured by contact with it.[14] But if the defendant puts a force in motion and that force injures another, he is liable in trespass, even though the force goes beyond his control and with different results from that intended by him. It has been held that when defendant went up in a balloon and afterward came down and was entangled in the trees on plaintiff's land and there called for help, he was liable in trespass for the injury done by the crowd which came upon plaintiff's land, both from curiosity and to assist him.[15] It has also been held that where a lighted squib was thrown into a crowd and those near where it fell, one after another, tossed it from them until it exploded and injured the plaintiff, the defendant who first threw the squib was liable in trespass, as the acts of the others were a mere continuance of his act, and done in self-defense.[16]

45. **Same subject—Possession of property injured.**—Where the trespass complained of is an in-

[13] Abbott v. McCartney, 1 Holmes 80 (U. S. Cir. Ct.), LEADING ILLUSTRATIVE CASES.

[14] Green v. Belitz, 34 Mich. 512.

[15] Guille v. Swan, 19 Johns. 381 (N. Y.).

[16] Scott v. Shepherd, 3 Wilson 403, 2 W. Bl. 892 (Eng.); Smith Lead. Cases 797 (8 Am. ed.).

jury to property, the property must have been in the possession of the plaintiff at the time of the injury. This possession may be either actual or constructive, but it must be a present possession. The action of trespass is based upon an injury to the possession. This rule is so strong that a possessor of the property may maintain trespass against a wrongdoer, and the wrongdoer cannot defend by proof that plaintiff's right of possession was but a temporary right. If the owner of the reversion, not having possession, wishes to bring the action he must sue in trespass on the case, and not in trespass. The fact that the plaintiff has given up the possession of the property to another before action is brought, does not furnish any defense to the action. If the property is in the hands of a servant or other person under the command of the plaintiff the possession is still constructively in the plaintiff. In the case of land occupied by a tenant at will, the decisions are conflicting as to whether or not trespass will lie as a remedy for the owner, some cases holding that the possession is constructively in the owner, while others hold that it is not. When no person is in possession the owner of the legal title is held to be in constructive possession. A railroad or other common carrier, the bailee, and even the finder of goods may maintain trespass against a wrongdoer using either actual or implied force to the injury of such property.

46. **Trover.**—The action of trover (sometimes called trover and conversion) lies for the conversion to his own use by defendant of personal property in which the plaintiff had a general or special owner-

ship, and of which the plaintiff had possession or to the possession of which he was entitled. The object of the action is to recover the value of the property, and not the property itself. If the plaintiff wishes to recover the property itself he should bring either detinue or replevin. The action of trover originally was brought to recover the value of personal property lost by the plaintiff, which was found by the defendant and then converted to his own use. The courts afterward held that the defendant could not defeat the action by showing that he had wrongfully taken the property instead of having found it. The action was thus extended to all wrongful conversions of personal property. The gist (substance) of the action is the conversion of the property, and the allegation that the property was found cannot be denied and need not be proved. The action goes on the presumption that the property was lawfully obtained, but it may be maintained for the conversion, however the property was first obtained by the defendant.[17]

47. **Same subject—Essentials of cause of action.** —The action of trover can only be maintained for the conversion of specific personal property, and cannot be maintained for injuries to land, or the removal and conversion of fixtures, growing crops, standing timber, or other incidents of real estate. When there has been a constructive severance of fixtures, etc., as in case of a mortgage of growing crops, or questions between landlord and tenant in regard

[17] Simmons v. Spencer, 3 McCrary 48 (U. S. Cir. Ct.), LEADING ILLUSTRATIVE CASES.

to crops, the action of trover will lie. The property must be specific personal property, definite and certain, and it may even be certain specific money; but trover will not lie for the collection of a debt or for money had and received generally. The plaintiff need not be the sole owner of the property, as he may recover for his part of the property owned in common; but he cannot recover from his co-tenant for a mere exclusion, and without a conversion. The plaintiff need not be the absolute owner of the property converted, as any special ownership in the goods, such as the right of a sheriff holding them on execution, will support the action. The plaintiff must have had either an actual or a constructive possession of the property, or he cannot maintain the action. Thus, where goods were leased with a house and afterward they were sold by the sheriff on an execution against the lessee, they were not in the possession of the owner to support his action of trover,[18] and he should have sued in trespass on the case. Where goods are bought and there is no delivery the buyer's remedy is against the seller in assumpsit, and the seller must proceed against a wrongdoer converting the goods. Ordinarily the facts which will support trespass will also support trover, and vice versa; but trespass will sometimes lie where an action of trover will not, as where there has been a taking, but it was followed by abandonment without a conversion, taking being sufficient to support trespass, while conversion must be shown to support trover. Trover will sometimes lie where

[18] Gordon v. Harper, 7 T. R. 9 (Eng.).

trespass will not, as where a bailee having the lawful custody of goods sells or otherwise converts them. But a mere detention of goods without a demand is not a conversion. In trover the plaintiff must show each of the following elements: either a general or a special property in the goods; a dispossession or present right of possession, and a conversion by the defendant.

48. **Trespass on the case.**—Trespass on the case is used to recover damages where the injury is not accompanied by force, or results indirectly from a wrong done by the defendant, or where the owner is not in possession at the time of the injury.[19] This necessarily carries with it all of the following cases: (1) Where the thing injured is so intangible that it cannot be the object of force (such as a franchise, right of way, etc.); (2) where the injury was not immediate but consequential (such as leaving an object in the highway whereby plaintiff drove or ran against it and was injured, or otherwise creating a condition which caused injury); (3) where the plaintiff owned but a reversionary or other property in the thing injured, less than the whole title, whereby the plaintiff was not in possession, either actual or constructive, of the thing injured. This action, though properly named trespass on the case, is commonly called case. The action may arise from the conduct of the defendant in any of the three ways following: (1) By the failure of the defendant to do some act he was under a duty to do; (2) by the de-

[19] Emigh v. Pittsburgh, Fort Wayne and Chicago Railroad Company, 4 Biss. 114 (U. S. Cir. Ct.), LEADING ILLUSTRATIVE CASES.

fendant doing in a wrongful and improper way an act which he might lawfully do in a different and proper way, or which he was under a duty to do in a different and proper way; (3) by the defendant doing some act which he had no right to do in any manner. The injury may be either to the absolute or relative rights of a person, or to any of his property, tangible or intangible.

49. **Same subject—Distinctive features of action on the case.**—This action was originated to supply a remedy for those wrongs which were not covered by the old original common law actions. It serves as a supplement to the actions of trespass and trover. When the possession of the property is not such that trespass or trover will lie, or where the property is so intangible that it cannot be the object of force, or where the injury is otherwise not the direct result of the force, the plaintiff must rely upon the action of trespass on the case. The question of the directness of the injury as a result of the wrongful act, and whether the injury was the result of omission or commission, has caused most of the confusion among students and lawyers in distinguishing and making use of the actions of trespass and trespass on the case. The general line of division between them might be stated thus: if the injury is the result of an overt act affecting tangible property of which the plaintiff is in possession, the remedy is trespass, while if it is a failure to act in such a way as to fulfill a legal duty of the defendant, or the plaintiff is out of possession, or the property is intangible, the remedy is case. Thus, it has been said that if one turns

a savage beast loose and it does an injury the action is trespass, while if he keeps a wild beast which escapes and does injury the remedy is case; for the first is the result of force set in motion by the act of the defendant, while the second is merely a failure sufficiently to control a force in possession. All injuries which are the result of defendant's negligence, or where it cannot be said that the force started by the defendant reached to and caused the injury, must be recovered for by an action on the case. Where the action of trespass or trover (or both) is applicable the plaintiff should not attempt to maintain trespass on the case. But where the defendant has merely failed to do an act which it was his duty to do for the plaintiff (as where an officer fails to perform a duty for plaintiff to plaintiff's injury), or defendant has indirectly caused an injury (as by causing a malicious prosecution of plaintiff on a criminal charge), the remedy is trespass on the case. Where the negligence of defendant's servant causes an injury the remedy must also be trespass on the case. Where the statute provides for the recovery of a penalty and no other remedy is provided, case is a proper remedy. In a few instances both trespass and case will lie. The student should in all close cases make an examination of the law of his own state before attempting to determine which is the proper remedy in the given case.

50. **Detinue.**—The action of detinue lies where the plaintiff seeks to recover specific personal chattels from the defendant, together with damages for their detention. If the chattels cannot be returned

the plaintiff may recover their value, together with damages for their detention. The plaintiff cannot maintain the action unless he has some right to the immediate possession of the chattels sued for. The gist of the action is the wrongful detention of the chattels, and it lies for their recovery whether they were rightfully or wrongfully obtained by the defendant. Unless the detention is unlawful of itself, without any demand for their return, the plaintiff must plead and prove a demand on the defendant for the goods to support the action. The action can be maintained only against those having actual possession of the goods. The goods sued for must be specific certain personal property, and the action cannot be maintained for the recovery of fixtures or other part of or interest in real estate. The plaintiff may maintain the action on either a general or a special property in the goods against a wrongful withholder of them. In some states the action of detinue is to a certain extent combined with the action of replevin, by the enactment of statutes modifying these actions.

51. **Replevin.**—The action of replevin lies to regain the possession of personal chattels which have been wrongfully taken and are wrongfully detained by the defendant, together with damages for their detention.[20] In most states, by statute, the action also lies where the defendant obtained the rightful possession of the goods, but wrongfully detains them. The action of replevin, like detinue, lies to obtain possession of personal property only, and not of fix-

[20] Williamson v. Ringgold, 4 Cranch 39 (U. S. Cir. Ct.).

tures or other part of an interest in real estate. The plaintiff cannot maintain the action unless he has the present right of possession of the property, and the property must be certain specific chattels capable of description and identification. The chattels must be wrongfully detained by the defendant, and where not wrongfully taken the plaintiff must plead and prove a demand before the commencement of the action. The action originated in the tenant's action to recover goods wrongfully distrained by the landlord for rent, but long since was broadened to allow to any owner the right of recovery of any personal property wrongfully taken. In most states the old common law action has been superseded by a statutory action to recover possession of personal goods, which adopts many of the characteristics of the common law action of replevin.[21]

52. **Same subject—Immediate possession of goods.**—The primary object of the action of replevin is to enable the plaintiff to take immediate possession of the goods at the commencement of the action, without waiting for a trial and the decision of the court, while in detinue a plaintiff, suing for the recovery of specific goods and damages, is compelled to wait until the court has rendered a judgment before he can gain possession of the goods on a legal writ. At common law the plaintiff obtained the original writ of replevin from the court of chancery, commanding the sheriff to seize the goods described in the writ and deliver them up to the plaintiff, upon his giving a sufficient bond to prosecute the suit and return the

[21] Ricketts v. Dorrel, 55 Ind. 470, LEADING ILLUSTRATIVE CASES.

property and pay damages if he was not entitled to its possession. If the sheriff could seize the property he did so and delivered it to the plaintiff, who was liable on his bond to the defendant for any violation of his right to its possession. If the goods could not be found by the sheriff to return them to the plaintiff the plaintiff still prosecuted his action, and if he proved his right he was given a judgment for their value and damages for their detention. The declaration was not filed by the plaintiff until after the return of the writ by the sheriff, so that the declaration was worded differently in different cases to show whether the plaintiff had received the goods or they were still in the possession of the defendant.

53. **Same subject—Conditions of obtaining writ.** —Afterward, the original writ was abolished, and the plaintiff commenced his action by filing his declaration, and at the same time requested the sheriff to seize the property and deliver it to him, which he did upon the plaintiff giving him a sufficient bond for the return of the goods and damages. In this country the action is generally governed by statutes, some of which require a bond to be filed with the clerk before the writ is issued, and some require the sheriff to take and pass upon the sufficiency of the bond. Many of the states require an affidavit by the plaintiff or by someone in his behalf, showing the plaintiff's right to the goods, as well as a bond for the return of the goods and damages. All of these precautions are provided as a safeguard against the unwarranted use of the writ, and to protect the defendants from injury by its unwarranted

use. In some states the actions of replevin and detinue are combined, under statutory provisions, making one action for relief either with or without bond, depending upon the possession of the goods pending the action. The action of replevin, like detinue, applies only to the recovery of personal property. As in detinue, the plaintiff must show such title in the property as entitles him to its possession. At common law the action of replevin would lie only where there was a wrongful taking, and where that rule still prevails the plaintiff is still required to plead and prove a wrongful taking. In many states, by statute, replevin will lie where the goods were rightfully taken but are wrongfully withheld; but in that event the plaintiff should plead and prove a demand before action, to establish the wrongful detention. Replevin is an action of such powerful force in its first instance and so liable to abuse by taking property where the right is not clear, that the courts are loath to add to its scope or to reduce the requisites necessary to its use, and the reader should examine the statutes and decisions of his own state and fully reinforce himself in its essentials.

54. **Mixed actions.**—The mixed actions in use today are three in number, as follows: (1) Ejectment. (2) Writ of entry. (3) Forcible entry or detainer. The action of ejectment is an old common law mixed action, and is in common use in the United States. The writ of entry is an old common law real action which has been abandoned in most of the jurisdictions, but is used to some extent in a few states as a mixed action. It has been considered in

a former section of this subject.[22] The action of forcible entry or detainer was originated during the reign of Henry VI, and is used to some extent in most of the states of this country. We will consider the actions of ejectment, and of forcible entry or detainer, in the order named.

55. **Ejectment.**—The action of ejectment lies for the recovery of possession of real estate wrongfully held by the defendant, together with damages for its wrongful detention. It is a possessory action, wherein the present right of possession is the gist of the cause of action. The plaintiff is required to show such legal title to the land as shows his right to the present possession, but mere proof of former possession is sufficient as against a wrongful intruder and trespasser. The action was originated to give a tenant who had been ousted of possession a writ whereby he could regain the possession, and was not originally intended to try the title to the land. Afterward by legal fictions, it was resorted to as a quick method to escape the slow processes of the common law real actions.[23] It is largely governed by the statutes of the several states, but most of these statutes still recognize the principal characteristics of the common law action, as stated in this and the next section.

56. **Same subject—Essentials of action of ejectment.**—In the action of ejectment the plaintiff must show that he was once in possession and was dispossessed, and still has the right of possession, and that

[22] § 34.

[23] Stephen, Pleading (4th Am. ed.) * pp. 11-13, 32.

the defendant is in possession without right. The action is brought against the person then in possession. In most states the action may be brought either against the landlord or the tenant, where one holds or assumes to hold the title, and the other holds possession under him as against the plaintiff. At common law the action was against the tenant in possession, who implicated the title of his landlord. In suits brought to try title the action would be by John Doe, as the tenant of the claimant who brought suit, against Richard Roe, as the tenant of the adverse claimant, who would implead the title of his supposed landlord, and thus put the title in issue. Any legal title to the land supporting the right of present possession is sufficient for a recovery, but the plaintiff must recover on the strength of his own title, and not on the insufficiency of the title of his adversary. In other words, if the plaintiff does not show his own right to the possession it makes no difference whether the defendant has any right or not. The title must be a legal title, entitling plaintiff to possession, and not a mere beneficial interest in the land. At common law only nominal damages were allowed, and the plaintiff was required to bring another action for the rents and profits during the time the land was wrongfully held by the defendant. Under the statutes, in most jurisdictions, full relief is now given in the one action, the plaintiff recovering damages for the rents and profits enjoyed by defendant.

57. **Forcible entry or detainer.**—The action of forcible entry or detainer was not known to the com-

mon law, but was originated some five hundred years ago, during the reign of Henry VI of England.[24] It lies for the recovery of lands taken by force and for damages for taking and detaining them, and also to recover possession of lands of which the party in peaceable possession, without right, uses forcible means to keep possession and to exclude the owner. It is regulated by the statutes of the several states. There are but two questions involved under most of these statutes, which are: 1. Whether or not plaintiff was in possession of the premises. 2. Whether or not that possession was invaded by force, or was unlawfully invaded, and the wrongful possession thus acquired is held by force, and plaintiff is still excluded from the premises. The force may be implied from threats or putting in fear, or from nailing up the doors and windows to exclude plaintiff. Also intruding upon the rightful possession of another, though peaceably, and then keeping possession by force or threats give ground for this action. The title of the property is not in issue, as the act is aimed to promote the peaceful affairs of life, and to prevent one peaceably enjoying lands from being summarily driven therefrom, or one who is temporarily absent from his premises from being excluded by an intruder. It is a quick, simple action, wherein the use of force to accomplish or prolong the dispossession is the gist of the action. The student should read the statutes of his state governing this action, and examine the decisions construing the statutes, before attempting to use it.

[24] 3 Blackstone Commentaries (Cooley's 3rd ed.) 179.

58. **Forms of pleading to be followed.**—In all the states where the common law still controls the rules of pleading, the remedies which are afforded by the common law are the proper remedies to pursue. The student should examine some recognized work on common law forms applicable to his state, and carefully follow those forms when he attempts to prepare a common law pleading. This is not only wise because of the care and knowledge with which these forms were prepared, but because many of the words and much of the language used has acquired a legal meaning broader than its grammatical meaning. After the student has been in practice for twenty or more years there will be sufficient time for him to attempt an improvement of these forms, accepted and followed by the learned practitioners of his state. With the foregoing general suggestion, we will leave this phase of actions at common law, and take up other questions pertaining to the subject of pleading.

CHAPTER V.

PROCEEDINGS IN OTHER COURTS AND EFFECT OF THE CODE ON FORMS OF ACTIONS.

59. **Common law actions and suits in equity compared.**—The actions described in the preceding chapter are the ancient common law actions. Under the old English practice there also existed the court of chancery, which gave equitable relief to those persons who could not obtain adequate relief in a court of law. Equity has been defined as "The correction of that wherein the law, by reason of its universality, is deficient." But it is really a coordinate system of law, giving remedies in certain cases not provided for by the rules of the common law. Equity, under the English system of courts, was administered by the court of chancery. The chancellor was supposed personally to represent the king, and to have the keeping of his conscience, to grant relief when the king's general laws were such that they would cause an injustice. The original writs in common law actions were issued out of the court of chancery, commanding the common law courts to render justice under the laws of the king, as provided by the particular writ. This was the proper remedy where the common law and the methods used by the law courts furnished adequate relief. Where the common law did not furnish an adequate remedy, or the procedure used in the law

courts did not enable them to enforce a decree affording relief, the subject made his appeal directly to the chancellor, asking him personally to hear and determine the case. Under the earliest holdings of the chancellor this relief was wholly a matter of discretion, governed solely by the chancellor's conscience. After numerous petitions had been entertained and many cases decided by the chancellors, the practice began to crystallize into a known and definite procedure with certain defined rights of relief and certain defined defenses. Before the practice was as clearly defined and limited as it has since become, it was jeeringly said that for a chancellor to undertake to measure relief only by his conscience was more unreasonable than to attempt to measure it by the size of his foot, since consciences differed more than feet. But this jibe was unmerited, for the courts of equity really administer a system of established principles according to fixed rules, both the law and the procedure being adapted in great measure from the civil law which prevailed in the Roman Empire.

60. **Courts of equity.**—The chancellor heard and decided cases without the help of a jury and exercised a considerable discretion in giving or withholding relief under stated facts, though he could always take the advice of a jury for his own information when he chose to do so. Among the numerous things which the chancellor would hear and decide were petitions to correct deeds, where the intent of the parties was not expressed and there was excusable mistake in executing such instruments; to order

the specific performance of contracts, where they could be performed by the execution of a deed or other act which it was not too great a burden on the court to require done, and where the party asking for relief was without other adequate remedy and the right was clearly on his side; to issue injunctions; and to make such other orders as the equity of each case required, in good conscience, to be made. The petitioner (plaintiff), when he asked this extraordinary relief from the chancellor, was compelled to show himself fully entitled to it and without an adequate remedy at law. When he came into a court of equity he must show that he was himself without fault, for he "must come into equity with clean hands," or he would not be given relief. In his petition he was also compelled to show that he had either done all on his part to be performed, or, being prevented from doing all of his part, he must offer to do what it was his duty to do, since "he who would seek equity must do equity." The maxims quoted are among the many rules by which courts of equity have always been controlled in granting equitable relief, but which cannot be taken up in detail in this article.

61. **Code systems of pleading.**—In this country the same court usually administers both legal and equitable relief. Where the pleadings are still governed by the common law there are separate forms and a different practice in proceedings at law and in equity. The lawyer may one day appear before the judge and a jury, or the judge sitting alone, in an action at common law (such as an action in

trover), and the next day he may appear before the same judge sitting alone as a court of equity in a suit involving the right to an injunction or other equitable relief. In such event, where the court is in a code state, the form of the pleadings in each case will be the same, alleging the ultimate facts, but the pleadings in the common law action will be much shorter than the equity pleadings, since fewer facts are ordinarily required to establish a right at law than are needed to show a right to extraordinary relief in equity. In his pleading before a court on its equity side the plaintiff must state all of the facts showing his rights in the case, and must also show himself entitled to relief in a court of equity, alleging facts which show that he is without a remedy at law, or that the remedy at law is wholly inadequate, that the wrong complained of is not due to his fault or omission, and that he has not withheld any of the rights of the defendant, and all of the other facts which go to show that he is entitled to that particular relief under those particular facts. Where the proceeding is in a court governed by the old common law rules and the equity rules of pleading, respectively, in the different kinds of cases, there will be still greater difference in the length and even in the form of the pleadings. In all of the states a difference between common law and equitable relief and in the administration of each is still recognized. In all it has been found that some matters cannot be governed by rigid and unyielding rules, and that a limited amount of discretion must sometimes be exercised to reach a just result. For this reason the

discretion of a chancellor is still vested in judges to some extent in deciding equity cases; but a discussion of the rules of equity pleading is foreign to the subject of this article.

62. **Divorce and special statutory proceedings.**— The subject of divorce is controlled entirely by statute, as the old English law was opposed to the granting of divorces, absolute divorces being granted only by act of Parliament. Control over the subject of marriage was left to the ecclesiastical (church) courts, which, until the time of Henry VIII, were under the control of the Roman Catholic Church. But that church, as well as the present Established Church of England, do not countenance divorces. Each state in this country provides by statute what shall be the grounds for divorce, and what residence is required of the party seeking a divorce, what may be decreed regarding the rights of alimony and the custody and care of children, and all of the other matters which are incident to the breaking of marital vows, except so far as the common law rights of husband and wife are left to control. A lawyer who will thoroughly master the general rules governing the laws of pleading, so that he can prepare proper and sufficient pleadings in other matters, may look to the statute governing the subject of divorce in his state and prepare the pleadings for that proceeding. There are also other statutory proceedings, such as proceedings relating to drainage, highways, and other special matters, which cannot be considered in a general work. But with a knowledge of the general law of pleading in mind and with the statute pro-

viding for the particular proceeding before him, the lawyer will find no difficulty in preparing his pleadings and other papers in any statutory proceeding.

63. **Codes—Modification of the law of pleading.**—In many of the states codes of procedure have been adopted which change as well as codify the law of pleading. The courts of these states, with but few exceptions, hold that the codes only change the rules of the common law in so far as they conflict, leaving the remainder of the common law rules still in force. The various codes, to a great extent and in a general way, follow the codes of the states of New York and California. The code of New York was the first code of procedure adopted in this country. It was adopted in 1848, and several of the states soon after adopted codes to a great extent patterned after the New York code. The state of California afterward adopted a code containing the main features of the New York code but with very extensive modifications. The states east of the Missouri River, depending largely upon New York decisions, took the New York code as a basis from which to draft codes, as one state after another adopted them, while the western states, depending largely on California decisions, were inclined to take the California code as a basis in the preparation of their codes, and some of them enacted it almost in its entirety.

64. **Actions under the code—Forms of action abolished.**—Under all of the various codes it is provided, in substance, that there shall be but one form of action, which shall be known as a civil action.[25]

[25] Getty v. Hudson River Railroad Company, 6 How. Pr. 269 (N. Y.), LEADING ILLUSTRATIVE CASES.

All of the codes require that the parties shall state the facts constituting their respective causes of action or grounds of defense in plain and concise language, and in such a manner as to enable a person of common understanding to know what is intended. The form of action no longer controls, but the facts alleged must be sufficient to constitute some cause of action for which the law allows a recovery. Thus, in replevin or detinue, where the defendant obtained lawful possession of the goods, a demand before the action was begun must be alleged and proved, both at common law and under the code (unless the holding is shown to have otherwise become unlawful), since every necessary element of the action must be alleged under any form of pleading in stating the plaintiff's action. This rule requiring the statement of each necessary element of the action or defense pertains to each action and defense. Under the common law certain forms had acquired a legal meaning, and the particular form was required to reach a particular relief. Under the code the pleader is not required to confine himself to any set form of words, but he must state facts showing the existence of some cause of action or some defense to the action, to constitute a sufficient pleading. The various codes are intended to do away with forms and fictions of law, and to provide for one procedure, so far as possible, on both the law and equity sides of the court. It was the intent of the authors of these codes to make the pleadings honestly present the rights of the parties upon the facts of each case by requiring them merely to state those facts. The codes are not intended to

change the rights of the parties; that is, to give any person a right of action where none otherwise exists, nor to permit a defendant to escape liability where liability exists under the law. They were adopted merely to make straight the legal paths of pleading which the authors of the codes believed to be too devious and roundabout. Some attorneys contend that codes are a great improvement upon the common law pleading and equity pleading, especially by doing away with a double practice, while others contend that states with practice acts which merely modify the common law system of pleading in specified matters of detail have a better form of pleading. The student must accept in his own state what its legislature has provided.

65. **Same subject—Ultimate facts to be alleged.** —The ultimate facts are what the codes require to be pleaded, not the evidence to establish those facts, nor the legal conclusions deducible from those facts. Thus, a person should not state the various matters of evidence by which he expects to establish his cause of action or defense, but should state the ultimate facts which he expects to establish by that evidence. On the other hand, he must be careful to state the ultimate facts, and not merely the legal conclusions deducible from those facts, as alleging a conclusion does not make a complaint or answer sufficient in most jurisdictions where codes are in force. Thus, an allegation that you heard defendant's voice in a room would merely allege evidence that he was there, as it might have been a phonograph. You should allege that defendant was in the

room if that fact is material. Also an allegation that if defendant had done certain acts plaintiff would not have been injured would state a mere conclusion, not a fact. Where a person brought an action for the breach of a covenant of warranty in a deed, and alleged that the lands were mortgaged when sold to him, and that the mortgagee, by virtue of the power of sale contained in the mortgage, "sold and conveyed" the lands to another, it was held that the complaint was insufficient. The court said that the complaint should have alleged the facts showing that the mortgagee complied with the power of sale, by the giving of notice and otherwise, so that the deed which he executed actually conveyed the title, and added that the allegation that he "sold and conveyed" was a mere conclusion.[26] Although but few cases go to such an extreme as the above case, it illustrates the rule that the facts, and not the legal conclusions deducible from the facts, should be alleged. Where there is any question whether an allegation is of a fact or a conclusion, the young pleader will do well to examine some of the decisions of his own state bearing on that particular question, and thus to crystallize in his mind the application of the rule.

66. **Facts must be stated; not conclusions nor matters of evidence.**—Under the common law rules of pleading matters were stated according to their legal effect, while under the equity rules of pleading the facts in detail were set out in the pleadings. The code attempted a combination of these two

[26] Clark v. Lineberger, 44 Ind. 223.

methods of pleading so as to compel the ultimate facts on which the rights of the parties must depend, to be alleged. This rule requires that the lawyer shall know all of the elements necessary to constitute each cause of action or defense, and that facts showing each of those elements shall be alleged to present his client's cause. It requires the plaintiff's attorney to know and allege in his first pleading facts showing each element of a cause of action upon the legal grounds on which he wishes to base the action. It also requires the defendant's attorney to know each necessary element of the action and the elements of a defense necessary to defeat that action, and to state in an answer the facts constituting the cause of defense. In the early decisions under the codes many cases are to be found where the party would lose sight of the rule that he must state the ultimate facts, and would only allege the legal effect of the facts, as required by the common law, or would only plead the evidence by which he hoped to establish those ultimate facts. By reason of this the early reports under the codes are filled with decisions holding pleadings insufficient. The young pleader can avoid this difficulty by a little study of the decisions of his own state, and by carefully studying and following some good book of forms prepared for the use of lawyers in his state. At present there are sufficient decided cases to make the path reasonably clear to any mind if the cases are all studied and understood. Each lawyer must in the end study and gain a general knowledge of the law of pleading governing his own particular state. No general work

on pleading can give the rules pertinent to each of the various states under the code, or under a practice act in force therein. Neither the code, the common law, a practice act, nor any other mode of procedure devised by man can make it possible for the ignorant to do well what requires the best efforts of the learned and wise; but the young lawyer, by diligent effort and study, may overcome almost every difficulty and be able to prepare a sufficient pleading under either method of procedure.

67. **Kind of action brought determines right of recovery.**—Although the use of special forms of actions is abolished by all of the different codes, a plaintiff who undertakes to allege the essential facts of one action, when his evidence will only establish another and different action, is sure to fail under the code, as at common law. Thus, where a carload of iron was shipped over a railroad and evidently was stolen from the car before delivery, and the shipper brought suit under the code, alleging a conversion of the goods (at common law the action would have been called trover), the plaintiff could not recover upon proof which only showed a failure to deliver on the part of the carrier without showing that the carrier had done anything with the iron which it ought not to have done.[27] The action implied a positive wrong and the evidence only established a failure to perform a duty, therefore in the case cited the plaintiff must fail under any proper administration of justice, as failing to establish the wrong complained of. This rule applies to all other

[27] Vandalia R. Co. v. Upson Nut. Co. (1913), 101 N. E. 114 (Ind. App.).

actions; for, though a plaintiff may waive a tortious wrong and allege a lesser violation of duty implied from the wrongful act, he cannot allege and recover for a greater wrong than was actually done, thus implying a greater violation of his rights than there was, which would carry with it a greater liability under the law. The greater of two similar wrongs includes the lesser, but the lesser cannot include the greater, and there must be a similarity whereby the law will imply the lesser from proof of the greater, or the different action to recover for the lesser wrong will not lie. Nor can the plaintiff who has chosen the wrong action, as by suing in tort where he should sue in contract, amend his pleading to make it a declaration in the right kind of action, and thus prosecute such new action in continuation of the old one.[28]

68. **Statutes declaring special rules of pleading.** —In the code states some special actions, such as actions to recover land by way of a substitute for ejectment and to recover goods after the manner of replevin, to contest wills, and other actions given by statute, are provided for. The provisions of the statute giving any such action must govern the practice in those cases, rather than the general rules of pleading, but ordinarily the same rules of pleading requiring a statement of the facts which constitute the cause of action will control, except as the statute expressly declares what shall be alleged.[29] The intelligent student will be able to determine whether any other rules are added to the general rules, and

[28] Supervisors, etc., v. Decker, 34 Wis. 378, LEADING ILLUSTRATIVE CASES.
[29] Anderson v. Caldwell, 91 Ind. 451, LEADING ILLUSTRATIVE CASES.

whether a statute giving such an action excuses compliance with the general rules of pleading; if not he should comply with the rules governing an ordinary action. These special actions are provided for because an ordinary civil action is not so framed as to grant the relief required by the special action, and they are not provided for with any purpose to create a different procedure in so far as the ordinary rules of pleading will apply.

CHAPTER VI.

PARTIES TO ACTIONS AND JOINDER OF ACTIONS.

69. **Who must be brought before the court.**—Before any action can be prosecuted the plaintiff must cause notice to be given to all of the necessary parties to the action. A person seeking the decision of a controversy by a court should bring all of the parties necessary to its full determination before the court for a hearing and determination of the matter. Every person having the legal right to control the action must be in court to control it. Where more than one person has an interest in the subject of the action, all having a legal right on either side should be made parties. But if a person interested on the same side of the case with plaintiff refuses to join in bringing the action, the codes permit him to be made a defendant and brought before the court with the rest. At common law the action must be brought in the name of the party having the legal interest, though that was not always the real party whose rights had been infringed. This often required the action to be prosecuted in the name of some person having only the legal title to the property or right, who did not have any beneficial interest in it. Thus, the payee named in a note sued on must be the plaintiff at common law even though he had sold and assigned it or had parted with all the beneficial interest in it he ever had. The codes of the

various states require that an action shall be prosecuted in the name of the real party in interest, except in a few cases, among which are ordinarily the cases of actions by executors, administrators, and trustees of express trusts. Trustees of express trusts are ordinarily held even to include a person in whose name a contract is made for the benefit of another. All who were intended to control the management of a trust matter and whose judgment was intended to be the controlling factor in regard to an affair are included by the term.

70. **Assignment of rights of action.**—The common law, as a general rule, required that in an action on a contract which has been assigned, the action must be maintained in the names of the original parties to the contract. The code changes this rule, and where the assignment is made by indorsement the assignor is ordinarily not even a necessary party to the action. But where the assignment is not in writing, or is made on a paper separate from the contract, the assignor must, in most states, be made a party to the action to answer to his interest, if any, in the contract. In many of the common law states statutes have been passed which modify the rule regarding the parties to actions on assigned contracts. Under the early common law rule, choses in action (claims by contract and otherwise against others) could not be assigned. Under the law now in force in all jurisdictions all rights under contracts may be assigned, conveying a right of action (in the assignee's own name, under the code) against the promisor. This rule does not allow a person under a contract

obligation to escape liability by assigning to another the performance of his contract duty without the consent of the promisee, thus possibly substituting an irresponsible person in his stead; that would promote injustice and not justice. But he may assign his own right to recover. The right of assigning choses in action only enables one to assign rights under contracts. It does not give the power to assign an obligation to perform a contract, or to assign a cause of action for an alleged wrong (an action in tort), such as the right to recover damages for an injury to a person's body. There is a possible exception to this rule in the fact that where the defendant has maintained a nuisance and the property is conveyed, and the defendant still maintains the nuisance, the assignee, by an action to abate the nuisance, may obtain full damages for its maintenance. This is because of the wrongful continuance of the nuisance affecting the grantee's property rights.[30] The right to recover damages for the past maintenance of the nuisance cannot be assigned separate from the property, nor can it be assigned to a grantee of the property if there is not a continuance of the nuisance by the defendant after the property is conveyed. Some states have statutes which even permit the assignment of rights of action in tort which have fully accrued and are of kinds that will survive the death of the plaintiff and defendant.

71. **Joint and several rights and liabilities.**— Under the common law rule all persons jointly inter-

[30] Some v. Barwish, Cro. Jac. 231 (Eng.).

ested must sue together as plaintiffs, and those persons jointly liable must be sued together as defendants, while if there were several parties, each severally liable upon the contract, they could be sued separately. But where there are several persons, each having a right of action, or against each of whom there is a right of action on a distinct and several liability, so that there is no joint interest, the contract, as to them, is several, and each must sue or be sued severally. If the contract is such that the plaintiffs have an option to consider the contract as either joint or several, each must sue separately, or all must sue together, and the suit must be against all of the defendants jointly or each of them separately, depending on which option is exercised. They cannot join a portion of the parties plaintiff, or less than all of the parties defendant. Under the code, all having a joint interest must be made plaintiffs, unless they refuse to join in the suit (when those refusing may be named as defendants to answer to their interest), or except in cases where the parties are so numerous that it is impracticable to join all as plaintiffs. These provisions were borrowed from the rules of equity pleading and did not apply in actions at common law. The code has also changed the common law rule by allowing the plaintiff to sue any two or more of the defendants, where there are several jointly and separately liable on the same contract, instead of compelling him to sue either only one of them or all of them, as at common law.

72. **Parties to actions in torts.**—In actions for

wrongful injury (actions in tort, called actions ex delicto), there is no material difference in the rule regarding the parties at common law and under the code. The only exception is that under the common law the person holding the legal title to property must bring an action for an injury to it, while under the code the real party in interest must bring the action. But this does not ordinarily mean that a person having merely a beneficial interest in the property and no title may bring suit even under the code. Both at common law and under the code, if the injury is joint as to several persons, or if it causes a joint damage, all the injured persons must join in the suit (or under the code the persons refusing to join should be made defendants to answer to their interest). Where there is no joint interest the persons injured by a single wrong should each bring a separate suit for his damages. The plaintiff or plaintiffs may sue one, several, or all of the persons assisting to inflict an injury. He or they may sue a portion of those liable for the tort in one action, and bring one or more actions against all or a portion of the others liable. He may thus prosecute his remedy at his pleasure, and none of the defendants have reason to object that he is not prosecuting other participants, or that he is prosecuting them in other actions. The method of plaintiff's management and prosecution of his remedy is not the concern of one who has done him a tortious wrong, and each of the wrongdoers is liable for the whole of the injury that he joined in causing. In all jurisdictions separate actions against each of the wrongdoers may

be maintained at the same time. In some states the plaintiff may recover as many judgments as he desires against as many of the participants as he wishes, while in some jurisdictions he is only permitted to take a judgment in one action. But he can obtain only one satisfaction for the injury in any jurisdiction, whether it be by suit or settlement. The payment of one judgment for the wrong and its acceptance by the plaintiff always releases all other persons liable for the wrong; and in some jurisdictions any effort to collect one such judgment, as by execution and levy, has that effect, while in others it is only a satisfaction of one of the judgments which will operate as a release.[31]

73. **Misjoinder and nonjoinder of parties.**—Both at common law and under the codes, in actions on contracts, either a misjoinder or nonjoinder of parties plaintiff may be taken advantage of by demurrer when the defect appears on the face of the plaintiff's pleading. Under the code, if there are too many parties plaintiff the grounds of the demurrer should be, in substance, that the facts stated do not constitute a cause of action; but the language of the code should be followed in stating such cause, the assertion being true as applied to any cause of action on behalf of the surplus parties. At common law the question might also be raised by a motion in arrest of judgment. Under the code, when the misjoinder or nonjoinder of parties appears on the face of the pleading and is not questioned by demurrer it is generally held to be waived, though the rulings are

[31] Fleming v. McDonald, 50 Ind. 278.

not uniform. At common law, if the misjoinder or nonjoinder of parties is not shown on the face of the pleading it may be raised by plea in abatement, or at the trial by a motion for nonsuit. The decisions under the codes are not altogether in harmony, but the general rule is that the defect must be raised by plea in abatement or by demurrer, or it is waived. Where the action is in tort the same rules apply regarding the misjoinder of the plaintiffs which apply in actions on contracts. Where the defect is a nonjoinder of parties such defect must be questioned either by a demurrer or plea in abatement, or it will be waived, except that the right of the defendant remains to insist that only such portion of the damages as belongs to the plaintiffs joined shall be awarded.

74. **Same subject.**—Where there is a misjoinder or nonjoinder of the defendants in actions on contract the defect may be raised by demurrer under both the common law and the code. Under the common law it may also be raised by motion in arrest or for a nonsuit. But under the code a failure to question a pleading on the ground of a defect of parties until after verdict is generally held to waive the defect as to all of those liable, though a defendant not liable stands upon the same ground as a party in any action whose liability is not shown. If the defect does not appear on the face of the pleading it should be raised by plea in abatement on behalf of those liable, or it is waived, except at common law in cases where it appears that the omitted defendants who are jointly liable are still living and within the juris-

diction. Any persons not liable and improperly joined may defend upon the merits on the ground that they are not liable, though made parties. No liability is admitted by failing to take advantage of a misjoinder or nonjoinder of parties. In actions in tort a defendant who is liable cannot object because others also liable are not sued. Where more defendants are sued than are liable, the defendants liable cannot object because others not liable are also joined, unless possibly in an action where there could be no joint liability, as in a slander, when it might, in some jurisdictions, be raised by demurrer. The defendants not liable may demur where their defense appears on the face of the pleading, otherwise they may defend on the merits.

75. **Joinder of actions.**—The plaintiff, having determined what action to employ (if he lives in a common law state) or the facts provable in his action and the law governing them (if he lives in a state governed by a code) and having also determined who should be made parties to his action, must then state his cause of action in his first pleading. He must first determine the best method by which he can present his action in the most favorable light before the court and jury. He may also have several actions of the same nature against the same defendant which he desires to join, such as actions to enforce payment of two or more different notes, or he may wish to state one cause of action in several ways to forestall the possible variations of the evidence which may be produced at the trial, which is a practice allowed and followed in many states. By the earliest com-

mon law rules the plaintiff could bring but one action under a single writ. This rule was afterward modified and the plaintiff was allowed to bring suit on several claims of the same nature in the same action, but each must be stated in a separate paragraph of the declaration. This practice of allowing the joinder of actions was established in order that the plaintiff might join distinct and separate causes of action of a kind that could be tried together. The practice was afterward developed of stating the same cause of action in different paragraphs as though each were a separate cause of action, which is still a common practice in some states.[32]

76. **Same subject.**—The practice of stating a cause of action in several paragraphs of the declaration in different ways and under different theories of the law is often employed where the plaintiff is uncertain as to just what the evidence will prove and wishes to state his cause of action in such manner that it will certainly be supported under one of the paragraphs by the evidence brought out at the trial. Thus, in an action for the injury of a person, the plaintiff may state his case in one paragraph, charging defendant with some form of negligence causing the injury; and in a second paragraph he may charge a different act or omission as being the negligence of which defendant is guilty. In a third paragraph he may allege that plaintiff was in a dangerous place and unable to escape, and that defendant saw and was aware of plaintiff's peril in time to prevent the injury, but negligently caused it (seek-

[32] Garland v. Davis, 4 How. 131 (U. S.), LEADING ILLUSTRATIVE CASES.

ing to escape the rule of contributory negligence by this paragraph); and in a fourth paragraph he may allege that the injury was intentionally inflicted by the defendant. In some states the defendant, in the case supposed above, may make a showing that all of the paragraphs count upon the same injury and require the plaintiff to elect on which of them he will rely. In other states the plaintiff may rely upon them all, and on appeal by the defeated defendant may uphold the judgment if the evidence supports any one of the paragraphs of his declaration. The common law rule permitted several distinct causes of action of the same nature and character, or to which the same plea could be pleaded, and on which the same judgment might be rendered, to be joined in the same action. In the several states of this country the joining of causes of action is largely governed by statute. The several states are not uniform as to what actions are allowed to be joined, but the statutes in all of them are intended to permit the joining of those actions which may be tried together without inconveniencing the court or confusing the jury. In most jurisdictions a considerable discretion is given to the trial court in the matter of the joinder and separation of actions. The student must examine the statutes of his own state upon the subject of joining actions to know what is allowed there.

CHAPTER VII.

THE PLAINTIFF'S FIRST PLEADING AND GENERAL RULES OF PLEADING.

77. **Use of forms in preparing pleadings.**—The plaintiff, having determined what action at common law is the proper remedy in his case, or the facts and elements which constitute his cause of action if he is proceeding under the code, and having determined who are the proper parties, plaintiffs and defendants, and whether to make his pleading in one or more paragraphs, is then ready to state his cause of action. In stating a cause of action under the common law a young attorney should be careful to follow the established forms and rules of pleading, and to state all facts which the form books indicate are pertinent and necessary. In stating his cause of action under the code he will do well to consult some good work on forms of code pleading used in his state and to use one of these forms as a suggestion for the statement of his action. But his chief care must be to know which of the facts that he is able to prove will make a cause of action on behalf of his client, and then to allege those facts. In preparing his pleading, either at common law or under the code, the attorney should make each allegation in a positive form, stating clearly facts supporting each element of the cause.

78. **Matters which need not be stated.**—It is one of the essentials of good pleading that "All plead-

ings must contain matter pertinent and material." This rule is applicable to any form of pleading and to every pleading in its order, and in fact to every effort by statements of the matters relied on by each of the parties to reach an understanding of what is the question at issue between them. As was said above, a pleading must allege every substantive fact which is essential to the statement of the cause of action or defense in that particular action. If the law has affixed a definite legal meaning to certain words, as is true where common law forms are required to be used, the allegations should be made in those words. Otherwise the facts may be plainly stated in ordinary language. The facts should all be alleged with certainty and positiveness. The pleader need only allege matters of fact, and need not allege any of the matters which are declared by the law in force in the jurisdiction where the court is held (except when alleged in order more clearly to bring out the force of the facts stated). In short, the pleader need not allege any fact or matter of which the court will take judicial notice, which includes all unquestioned facts of which the whole community has general knowledge or is presumed to know, such as the course of the seasons, boundaries of the state, or any such generally known fact. Neither need the pleading allege in detail the facts necessarily implied from the facts alleged. Nor need it allege facts which the law presumes to be true until the contrary is alleged by the opposing party. This rule applies to all of the pleadings, whether those of the plaintiff or those of the defendant.

79. **Statement of general rules.**—In making these allegations the following rules as to the certainty required in pleadings should be kept in mind:

Rule I. "Pleadings should not be double" (that is, no paragraph should allege more than one sufficient ground of the pleader's action or defense).

Rule II. "The pleading must have a certainty of place" (that is, it should show where the alleged facts occurred creating the cause of action or defense).

Rule III. "Pleadings must have certainty of time" (that is, where facts constituting a cause of action are alleged, the time when they occurred should be alleged, and the same rule should be observed in pleading facts as a defense).

Rule IV. "The pleadings must specify quality, quantity, and value."

Rule V. "The pleadings must specify the names of persons" (that is, where a person is alleged to have done an act his name should be given).

Rule VI. "The pleading must show title" (when title is depended on as an element of the cause).

Rule VII. "The pleading must show authority" (where authority is depended on).

Rule VIII. "Whatever is alleged in a pleading must be alleged with certainty."

80. **Qualifications and exceptions to general rules.**—The rules set out in the preceding section are qualified by the following rules in limitation of the certainty required:

(1) It is not necessary in pleading to state that which is merely matter of evidence.

(2) It is not necessary to state matter of which the court takes notice ex officio. The court takes such notice of all public laws of the state where the action is pending, whether common or statute, but not of private law, unless the statute expressly so directs. Where an action arises in another state, or the law of another state is relied upon, the foreign law must be pleaded and proved as a fact. It is necessary also, in some cases, to make mention of the law of plaintiff's own state for convenience or intelligibility of the statement of facts. As it is unnecessary to state matters of law in a pleading, it is equally improper, when any matter of law is alleged, to make it the subject of traverse.

(3) It is not necessary to state matter which would come more properly from the other side. Thus, it is unnecessary to anticipate the answer of one's adversary. It is sufficient that each pleading should contain in itself a good prima facie case, though whatever is essential to a prima facie case must be stated. But there are certain pleas which are regarded unfavorably by the courts as tending to shut out the truth, and these, such as estoppel, that the other party is an alien enemy, and the like, must be certain in every particular. They must meet and remove, by anticipation, every possible answer of the adversary.

(4) It is not necessary to allege what the law will presume.

(5) It is not necessary to allege circumstances necessarily implied.

(6) A general mode of pleading is allowed where

great prolixity is thereby avoided. The proper extent or application of this rule is largely a matter of the exercise of a practical judgment, only to be gained by study of the precedents.

81. **Same subject continued—Other exceptions to the rules.**—(7) Pleading in the form of general allegations is often sufficient where the allegation on the opposite side must reduce the matter to certainty. Thus, pleading performance in actions of debt on bond may be general; likewise, where the condition is for the performance of covenants or other matters contained in an indenture or other instrument collateral to the bond sued on and not set forth in it. But this does not apply where the covenants or other matters mentioned in the collateral instrument are either in the negative or the disjunctive form, for here the allegation of performance should be more specially made so as to apply exactly to the tenor of the collateral instrument.

In pleading performance of matters contained in a collateral instrument, it is necessary not only to crave oyer of the condition and set it forth, but also to make profert of the collateral instrument and set forth its whole substance. But this rule is greatly modified by statutes in many jurisdictions.

The plea of non damnificatus to an action of debt on an indemnity bond is an example of general pleading on behalf of the defendant.

(8) No greater particularity is required than the nature of the thing which is pleaded will conveniently admit.

(9) Less particularity is required when the facts

lie more in the knowledge of the opposite party than of the party pleading.

(10) Less particularity is required in the statement of matter of inducement or aggravation than in the main allegations.

(11) With respect to acts valid at common law but regulated as to the mode of performance by statute, it is sufficient to use in the declaration such certainty of allegation as was sufficient before the statute. But the plea should show the agreement or other instrument to be in writing if the statute makes writing necessary. Under the code contracts which the Statute requires to be in writing should always be pleaded as written instruments.

82. **Pleadings must not be double.**—The foregoing rules of pleading apply generally to all of the pleadings in the case, including the declaration or complaint of the plaintiff, alleging his cause of action, or the plea or answer of the defendant setting up a defense, and all other pleadings by either of the parties in an effort to overcome any former pleading. We will now take up these general rules as given above and consider each separately. Rule I. "Pleadings should not be double." This rule is intended to promote a single issue. The plaintiff in his declaration should state one sufficient ground for his action, and the defendant one sufficient ground of defense, in each paragraph pleaded. The rule applies to all pleadings in the case. A violation of this rule will make a pleading subject to demurrer in some states, while in others it will make it subject to a motion to separate the causes of action or defense. If a plaintiff

desires to state more than one ground for his action he should prepare as many paragraphs of his pleading as he believes he has grounds of action. Each of these paragraphs should be sufficient within itself as a pleading, and should in no way depend upon any statement in any other paragraph. There is no uniform rule common to all the states regarding the right of stating the same action in several paragraphs. Some states countenance the practice, while in other states it is a matter of discretion vested in the trial court, and it seems that some courts always compel the plaintiff at the trial to elect on which paragraph of his declaration he will rely. If the defendant wishes to state more than one ground of defense he may do so at common law and in all of the states which have adopted codes or otherwise modified the common law rules of pleading. But he must state each separate ground of defense in a separate paragraph, sufficient within itself, and without any dependence whatever upon the allegations of any other paragraph. A few of the states require that the defendant shall swear to the facts pleaded as a defense.

83. **Pleading must be certain as to place.**—Rule II. "The pleading must have a certainty of place." Under all systems of pleading this rule must be observed and followed. It is necessary to observe this rule where the action affects land, to show that it lies within the court's jurisdiction. If the action is not a local action (one affecting the title to land or for some other reason required to be brought within a particular venue) the place should, nevertheless,

be stated with certainty, to inform the defendant as an aid in preparing his defense, and so that the record of the final judgment will bar another action based on the same alleged cause. Under the common law, in transitory actions (those not required to be brought in any particular venue), the place could be alleged under a videlicet (that is, preceded by "to-wit" or "that is to say," which showed that strict proof would not be made), and at the trial the exact place need not be proved as alleged. Under the codes the true place should be alleged in all pleadings, though some states hold its accuracy more important than others, and a variance is not ordinarily material unless the defendant is misled or prejudiced by reason of the inaccuracy of the statement.

84. **Certainty in stating time, quantity, and names.**—Rule III, "The pleadings must have certainty of time," and Rule IV, "The pleadings must specify quality, quantity, and value," and Rule V, "The pleadings must specify the names of persons," merely reiterate the rule that pleadings should be positive and certain. The question of time is governed largely by the same general principles which govern the question of place. That is, that the time should be alleged and a date given for the information of the adverse party and the court, and when it is one of the essential facts of the cause of action special care should be taken to state it correctly. The time stated should show that the cause of action arose within the Statute of Limitations, or it should allege some fact taking it out of the control of the Statute. In stating value it should be stated in money

(dollars and cents). The quality should be stated with such accuracy as the circumstances permit, but such latitude will be allowed as is reasonable under the facts. The quantity should also be stated as accurately as is reasonably possible. In the common law pleadings it is common to state the quantity under a videlicet. In naming persons, as required by Rule V, the pleader should give the correct Christian names and surnames of any persons required to be named. If a plaintiff makes a mistake in the name of a defendant it must be challenged by a plea in abatement, or corrected by amendment on a suggestion of the mistake, or it is waived. If a mistake is made in stating the name of a payee of a note or other persons under whom the plaintiff claims, it will be fatal, as the proof will not support the allegation. Where the pleader depends on a written instrument for proof, the pleading should allege the name as used therein, unless there is a variation in the name as appearing in the instrument and that used in the assignment, when proper explanation of the variation should be made in the pleading. Then in such case it will be well, if the local statutes permit this to be done, to make the original party to the instrument a party to the action, whether he would otherwise be required to be such party or not, and let him answer as to his interest in the contract.

85. **Title and authority must be shown.**—Rule VI, "The pleading must show title," and Rule VII, "The pleading must show authority," both require a pleader who undertakes to set up a right to state facts showing the grounds on which that right is

based. The rule requiring the pleader to show title only requires him to show such title as supports the action. In trespass, for instance, this would be a title showing right of possession, any greater title being immaterial. The usual rule where there is a damage to property is to allege ownership generally, and then to prove the title necessary to support the action. If a specific title is alleged, the general rule is to require proof of that particular title, or of one which embraces the title alleged. That is, if the plaintiff alleges he is the owner in fee of land, although it would have been sufficient to allege and prove a less estate, he must prove that estate or he cannot recover, even though proof is offered which would be fully sufficient had the less estate been alleged. The party does not have to allege the exact nature of his adversary's title where his rights depend upon such ownership by his adversary, as the title is particularly within the knowledge of the adversary. Where a person claims an exemption or right by reason of his authority, as in justifying the taking of goods by a sheriff on execution, he must allege the facts showing such authority, as required by Rule VII. This authority need only be alleged in such general terms as to show that the authority existed, and that the pleader was within the bounds of such authority in doing the acts complained of.

86. **Certainty in all allegations required.**—Rule VIII, "Whatever is alleged in a pleading must be alleged with certainty," is but a reinforcement and supplement to all the foregoing rules. An issue in court should be definite and certain and the opposite

party should be informed of the intent of the matter alleged. The rule is somewhat relaxed where it would require too great prolixity, but the inclination of the courts is to require a party to state positively and accurately every matter essential as a foundation of the cause of action or defense. The safe rule is to become fully informed upon the legal essentials of the action or defense, and the particular facts of that case which may be truthfully alleged, and then to make the allegations sufficiently certain to be good in law, and not so strong in the statement of particulars as to result in a failure of proof on the evidence that can be produced. The decisions are not at all uniform as to the results which follow a failure of proof where the evidence does not conform to the allegations of the pleading by reason of those allegations being too minute, and the student should look to the decisions of his own state on the subject and carefully avoid transgressing the rule as there declared.

87. **Obscurity and confusion to be avoided.**—The nine rules following are to prevent obscurity and confusion in the pleadings and the issues formed thereon, and should be kept in mind by the student. Except Rule 6, they apply (with some modifications) to pleadings under the codes, as well as at common law.

Rule 1. "Pleadings should not be insensible nor repugnant." Rule 2. "Pleadings must not be ambiguous, or doubtful in meaning, and when two different meanings present themselves, that construction shall be adopted which is most unfavorable

to the party pleading it." Rule 3. "Pleadings must not be argumentative." Rule 4. "Pleadings should not be in the alternative." Rule 5. "Pleadings must not be by way of recital, but must be positive in their form." Rule 6. "Things are to be pleaded according to their legal effect or operation" (the foregoing rule applies to common law pleading, while the codes, following the rules of equity pleading, require the real ultimate facts of the case to be pleaded, and not the legal effect). Rule 7. "Pleadings should observe the known and ancient forms of expression, as contained in approved precedents." Rule 8. "Pleadings should have their proper formal commencements and conclusions." Rule 9. "Pleading which is bad in part is bad altogether."

88. **Direct, clear, and unambiguous averments required.**—Most of the foregoing rules are so clearly stated and the reasons for them are so obvious that they require no explanation. The first rule (§ 87) requires the pleader to state the facts in such manner that they may be clearly understood, and to avoid the omission of words or expressions necessary to the sense; to keep clear the main idea, and not to state, in one part of the pleading, matter in opposition to what is stated in another part. This rule also requires the pleader to keep in mind the matter alleged in former pleadings of the same series, and not to allege matter repugnant to his former pleadings in that action in attempting to overcome matter alleged by the opposing party. Thus, the plaintiff must not in his reply allege facts inconsistent with what was

averred in his complaint. A pleading may be introduced in evidence by the opposing party as an admission of facts by the party pleading it, and the rule only attempts to require that the pleadings should be intelligible and the statements honest. The second rule (§ 87) requires such a statement of all facts that the meaning will not be uncertain. If the pleader violates this rule and the pleading admits of two constructions, one in favor of the pleader and one in favor of the opposite party, the court will construe it as against the person pleading it, taking the construction in favor of the opposite party. The court does this on the ground that the party pleading a fact will state it as strongly as the facts will permit. This rule is not applied where it is apparent from the whole pleading that a construction favorable to the pleader was intended, but only where the construction is left in doubt. The third rule (§ 87) requires a pleader to state the matters on which he relies as constituting his cause of action or defense, and not other facts from which he would draw inferences in support of the right he asserts. He is not allowed to state other facts than those furnishing the grounds of his defense or action, and then to argue from the facts thus stated that the action or defense existed, but must allege the ultimate facts on which he depends; and if any inferences are drawn they must be drawn from the evidence to support direct allegations of the facts which are thus inferred.

89. **Direct and positive allegations required.**— The fourth rule (§ 87) requires a pleader to allege his grounds of action or defense in a positive man-

ner, and not in the alternative. He cannot allege that one fact "or" another fact is true, but must allege one of the two facts as the true fact. If he wishes to allege both facts in such manner that he will be entitled to the benefit of either that is proved, and they are not repugnant to each other, he should allege the existence of both; that one fact "and" another fact, not one "or" the other, are true.

The fifth rule (§ 87) is one of the most important rules of pleading, and is one that is more often violated than any other. Many pleaders will allege that certain facts "being" true, certain other things were done. If the recital is merely as an inducement to other allegations, and not really an element of the action or defense, it is not a violation of good pleading to state it in this manner. But if the fact so recited is one of the essential elements of the cause of action or defense, such a statement is not good pleading. Many cases have been lost because this form of reciting the existence of a fact was adopted instead of directly alleging that the fact existed. Thus a plaintiff will allege that, he "being" the owner of certain land, the defendant committed a certain trespass, instead of alleging his ownership in positive language. The old common law form of averment was that defendant "entered the close of said plaintiff," or otherwise alleged the ownership as a fact. A recital of the existence of a condition will not be held sufficient. It should be directly averred that plaintiff owned the land, as preliminary to the further averment that defendant entered upon it and committed the trespass complained of. What-

ever the pleader alleges should be alleged in positive and direct terms, and not merely recited as if the fact of its existence had been admitted.[38]

90. **Forms of pleadings and of alleging facts relied on.**—The sixth rule (§ 87) is applicable to common law pleadings, where the legal effect of an instrument of writing or fact is required to be pleaded. Even at common law there is an exception to the rule that the legal effect should be pleaded, i. e., in pleading an action of libel or slander. In libel and slander the precise words uttered or published are the gist of the offense, although where spoken words are not slanderous per se, the pleader is required to plead matter of inducement, called the innuendo, stating the circumstances and conditions under which they were used, to show that they were intended to be slanderous, and were so understood by the persons hearing them. But in every case of slander and libel, even at common law, the precise words must always be set out. Under the codes, in all cases, the ultimate facts should be pleaded, and not their legal effect. Also the codes require that copies of written instruments shall be recited in or filed with pleadings based thereon. The codes do not require that the evidence to support the facts relied on shall be stated, but they do command that the ultimate facts provable by the evidence shall be alleged, and not the evidence nor the conclusions under the law from the facts proved. Thus, while the common law form would be an allegation that defendant is indebted for the price of a horse (a conclusion), the proper

[38] § 86.

form under the code would be that the defendant bought a horse for a price stated, and failed to pay (stating the facts). The seventh rule (§ 87) requires that every lawyer pleading under the common law shall observe, above all things, that the ancient expressions must be accurately followed, where applicable. These ancient expressions hold a legal meaning far greater than their grammatical meaning, and the lawyer who attempts the substitution of a new for a proper expression merely shows his lack of learning. Even when pleading under the code the wise lawyer will not attempt to invent an expression where he may easily employ an expression of established and unquestioned sufficiency. All capable lawyers, under any rules of pleading, will follow beaten paths in the forms of expression where they are available and suitable. The eighth rule (§ 87) merely requires the use of known and sufficient expressions in the commencement and conclusion of pleadings, which all capable lawyers will follow in common law pleading, while they will at least take them as a suggestion in the preparation of pleadings under the code.

The ninth and last rule of pleading (§ 87) states in a terse way a well-known fact, that nothing is stronger than its weakest part, that a chain is no stronger than its weakest link, nor a pleading stronger than its weakest part. It results, as a matter of course, that a pleading bad in part is insufficient, the defective part destroying one of the elements necessary to the strength of the pleading.[34]

[34] § 86.

91. Demand for relief and conclusion.—Another rule to be observed by all good practitioners is that "The declaration should, in conclusion, lay damages, and allege production of suit." That is, having stated the amount of damages, the declaration states "And therefore he brings suit." Where an action is to recover damages, the plaintiff should allege that the wrong resulted in damage and allege a sum of money as the amount of damage caused by the wrong. This sum should be equal to or more than the amount which the plaintiff hopes to recover. The pleading should close with a demand for the relief desired by the plaintiff, which in an action at law for damages is a judgment for a sum of money. An action for damages would be without force in the absence of an allegation and proof of the damages sustained. The plaintiff must remember that he cannot recover more damages than are alleged, and the only limit upon the amount to be alleged is the jurisdiction of the court and any possible prejudice to be roused in the minds of the jury by asking too much. The question of the amount which will be alleged as the damages suffered is a matter of judgment and sound discretion, which cannot be laid down in any book; but a person of good judgment will easily adjust his demand to the facts of the case. At common law the declaration closed with the words, "And therefore he brings this suit," and as this was a part of the approved form, it was necessary to make the allegation. In most of the forms of pleadings under the code there is no such allegation, though it would not be improper to insert it in any

declaration or complaint. The proper conclusion of a plea or replication is treated of in another chapter.[35]

92. **Profert of sealed instruments—Reciting contents of writing.**—Another rule which should be kept in mind in pleading an instrument under seal at common law, is that "In all pleadings where a deed is alleged, under which the party claims or justifies, profert of such deed must be made." That is, if a person suing or defending at common law claimed that there was a written instrument under seal giving him the right or the exemption claimed, he was compelled to make an offer to the other party of an inspection of it, who might then read it and more fully know the nature of the claim which the pleader set up. This rule at common law only applied to writings under seal, where the action or defense was based upon the instrument, and did not apply to parol writings, nor to writings under seal where they were but incidentally evidence of the facts and not the foundation of the action or defense. Under the various codes, and in some states using practice acts which merely modify the common law, a written instrument, sealed or unsealed, or a copy thereof, must be recited in or filed with the pleading where a party founds his action or defense upon it. In case an action is founded upon a written instrument the codes and practice acts generally provide that the writing or a copy of it may be filed as an exhibit, and made a part of the pleading in that way. Where the party bases his right upon an instrument of writing, but it is not the foundation of his action or defense,

[35] §§ 114-119, 128.

the statutes ordinarily do not permit the instrument to be made a part of the pleading as an exhibit. Thus, if one party to a written contract should assign his rights under the contract, and the assignee should bring suit thereon as such assignee, the assignment in some states would not be made a part of the pleading by the filing of a copy of it as an exhibit. The advantage of making a copy of the writing an exhibit instead of copying it into the complaint is most apparent where the party wishes to file several paragraphs of his pleading and to depend upon one copy of the writing serving for all of the paragraphs, or where the instrument is very long. He then files it as an exhibit and refers to it in each paragraph, thus making the paragraphs much shorter, and often more intelligible.

93. **Pleading facts established by written contracts.**—It is held that setting out the instrument verbatim (word for word) is not a proper form of pleading, where the pleader fails also to allege its legal effect (under the common law), or the ultimate facts which it establishes (under some codes). At common law the plaintiff pleads the deed according to its legal effect, and where the defendant does not believe that the deed is properly pleaded as to its effect, he may demand oyer (inspection), that is, he can compel the plaintiff to set it out at length in its own language, and then the defendant may demur to the declaration as not being supported by the deed. Where the party relies upon several writings as forming one contract, they should all be connected in the pleading by proper averments showing that they

are all relied upon as one contract. The date of the instrument and the names of the persons named therein are essential parts of it, and should be correctly alleged. Where there are statutory requirements as to the execution, form, or other elements of the writing, the pleading should show that they were fully complied with. In short, whatever is pleaded should be so pleaded as to show that it is sufficient to establish a cause of action or of defense on behalf of the person pleading it.

94. **Title of the pleadings.**—All of the pleadings should be properly entitled, showing the venue, by giving the names of the state and county, and if the action is before a township or city court, the name of the township or city also. The title should also show the name and designation of the court, and the names of the parties. In most of the states the first pleading is the only pleading in which the names of all the parties must be set out in the title; while the title of any subsequent pleading is sufficient if it contains the names of the political divisions defining the venue of the court, and of the first named of the plaintiffs (in case there are two or more), followed by the abbreviation "v." and then by the name of the first mentioned defendant, each name being followed by the words "et al." ("and others"). Where the student is entirely unacquainted with the forms of pleadings used in his state he should go to the court house at the county seat and examine a sufficient number of pleadings of the different kinds to gain a concrete idea of their form and contents, as actually used. The reading of a few pleadings in

cases with which he is acquainted or about which he has heard, will, as was suggested above, give him a better comprehension of this subject than can possibly be given from an abstract study of the subject alone.

95. **Allegations must embrace all facts to be proved.**—The plaintiff's attorney, in preparing his declaration or complaint, especially under the codes, must be careful to allege facts in support of which all the evidence supporting his cause of action may be admitted. Under the common law the language of the form used in declaring upon the kind of action brought may have such a legal meaning, acquired by use, that while it may not (as some student believes) fully cover the evidence, if interpreted according to its grammatical construction, yet it will admit all proof in support of that particular action, however faulty the grammatical construction of the language as covering such evidence. The student must remember that the defendant is entitled to be fully informed of the grounds of the action, and the plaintiff must either state in his declaration facts from which those grounds appear, or plead some form which gives legal information to the defendant of those grounds. This does not mean that the pleader under the code must allege any information in regard to who will testify as witnesses, or what will be their testimony, or as to any other element of evidence which will be used to support the action. What it does mean is that the allegations shall be broad enough that the evidence to be offered at the trial will tend to support them. The student is re-

ferred to any good work on forms in use in his state to gain a better comprehension of the character of allegations usually employed in stating different kinds of actions. Where no general averment in the form which he is following covers the particular facts contemplated by the student, he should so modify the statement of facts suggested by the form as to make the allegations cover the facts which can be proved in his case, for each action depends upon its own peculiar facts. All forms given for use in code states are merely suggestive of the allegations of facts sufficient to cover each element of an action of the kind to which it relates. The student should remember that reading actual pleadings drawn by capable lawyers in cases with which the student is acquainted, will greatly assist in gaining an understanding of this subject.

96. **Verification of pleadings—Signing.**—In some states all pleadings must be verified by oath. That is, some person must swear that the allegations of each pleading are true. In other states only certain matters need be sworn to, as where the plaintiff demands a writ of replevin or a writ of attachment, or is asking for a restraining order or some other extraordinary relief. In the equity practice the pleadings were required to be verified, and this practice under the codes, so far as it is followed, was adopted from the courts of equity. At common law, pleadings were not sworn to. Those states requiring an oath to verify all pleadings do so to prevent false and fictitious pleadings and issues. The advantage and disadvantage of the verification by oath of all

pleadings, being an open question, will not be considered here. Each attorney must obey the law of his own state in this regard. Where an oath is required the pleading will be insufficient if it is not verified, and may be rejected or struck out on motion, though in many states the failure of the opposing party to raise the question is ordinarily held to waive it. Where an oath is required to give the court jurisdiction of the action, as where the plaintiff is required to make an affidavit of residence and the length of residence upon filing an action for divorce, as the laws of most states require, it is generally held that the court can acquire no jurisdiction of the action unless the affidavit is filed. Where it is held that the affidavit goes to the jurisdiction of the court, the failure to raise the question in proper time and in the proper manner will not be a waiver of the defect, but it may be raised at any later stage of the proceedings. This is because the state itself has an interest in those actions, and the parties cannot waive the interest and rights of the state: and as the court could not acquire jurisdiction for lack of the proper affidavit, there never was any proceeding before the court whereby the opposite party could waive his rights to raise the question. The plaintiff's first pleading and all other pleadings in the cause must be signed, either by the party or his attorney. An unsigned pleading is defective as being without authority from anyone.

97. **Filing the declaration, praecipe and process.** —The plaintiff's attorney, having fully inquired and learned all of the facts material to the action, and

having fully investigated the law applying to those facts, and determined who are the proper parties to be made plaintiffs and defendants, and thereafter having drawn his first pleading, alleging in positive and certain language each element of his action, with allegations comprehensive enough to enable him to introduce each matter of evidence necessary to support his action, must then file his pleading. This is done by taking it to the clerk of the court and requesting him to file it. In some jurisdictions, if the court is in session the practice is to file it in open court; while in others the practice is to file it in the office of the clerk, whether court is in session or not. An inquiry of the clerk will give information of the practice in each jurisdiction. A pleading is filed in open court by taking it into court and causing a memorandum to be made by the judge and clerk that it has been filed, and delivering it to the clerk as part of the court papers. In some jurisdictions a written praecipe (order) requesting the clerk to issue a summons for service upon the defendants must also be filed, while in others this is only required in case the court is in session and a return day earlier than the first day of the next term of court is desired. No written praecipe was required at common law, but writs of summons were returnable the first day of the following term. The written praecipe is short and simple, one form being that "the clerk will issue summons to the within named defendants, returnable the ——— day of ———" (signed by the attorney). Other forms in other states are more specific, but the praecipe is for the

information of the clerk, and what is sufficient to give him the necessary information is ordinarily held sufficient.

98. **Same subject.**—As has been shown in a former chapter, the plaintiff, in some jurisdictions, may serve notice of an intention to file a declaration against a defendant and set the law in motion, before he has prepared his declaration alleging his cause of action. Where this rule applies it merely serves to require that the defendant shall appear in court within a shorter time after the filing of the declaration, and does not excuse the plaintiff from afterward filing a pleading fully stating what rights he seeks to assert and how they have been violated. The time of bringing the action merely dates from the service of notice on the defendant in such a case, instead of dating from the time when the plaintiff files his first pleading. The declaration must be filed and the defendant properly commanded to appear before the plaintiff can require any positive acts to be done affecting the defendant or what he is enjoying, except in those actions, such as replevin, attachment, and other proceedings, where an affidavit is filed of facts showing a necessity for immediate action, and other proceedings where a bond is taken to insure the payment of damages if the order thus obtained violates the defendant's rights. In cases of that kind statements of facts showing the plaintiff's right, supported by oath, are required, together with a bond to reimburse the defendant for loss, and on compliance with these requirements the defendant's possession or other enjoyment is invaded be-

fore he has been given notice and afforded an opportunity to appear and defend the action. But except in such extraordinary cases, judgment can only be given after notice and after a declaration has been filed, and the court does nothing toward giving the plaintiff relief until after judgment, for each person is entitled to his day in court, with full information regarding the nature of the charge against him or the defense interposed, and the courts ordinarily will not take action affecting the rights of any defendant without affording him an opportunity to defend them. Notice is essential to "due process of law;" and while constructive notice to a party, as by seizing property in his possession or in which he claims an interest, and publishing a notice commanding him to appear, is lawful when it is impracticable to serve a personal notice, that form of notice is confined to cases of apparent necessity for its use.

CHAPTER VIII.

THE DEFENSES TO AN ACTION AND THE DEFENDANT'S PLEADINGS AND RULES GOVERNING THEM.

99. **Preliminary investigation by attorney for defendant.**—Where a defendant served with process calls upon a lawyer to defend him, the lawyer will examine the return of the officer serving the process to determine whether or not his client has been properly summoned. He will also inquire of his client to ascertain if he lives within the jurisdiction of the court. He will then obtain from his client a full statement of the facts bearing on the action, including those which are unfavorable to the client, and those tending to support any defenses to the action which the client thinks may be offered. Having these facts well in mind, he will consider: (1) Whether or not the court has jurisdiction over the subject of the action and his client (if properly served with process); (2) whether or not his client has been sufficiently served with process to compel him to defend the case in that court; (3) what defense he may make to the action as brought. If for any reason he believes the court has no jurisdiction of his client, as when the client may lawfully insist on being sued in another county, or has not been properly served with process, he should not enter a general appearance to the action, but appear specially to present his objections on these grounds. If he enters a gen-

eral appearance such appearance will waive these matters, since the defendant may waive notice and enter an appearance without it, and may submit his controversies to a court other than that of the county or political subdivision in which he lives. If the court has no jurisdiction of the subject matter, as when the action is for divorce in a court having no jurisdiction of divorces, he cannot waive the defect, as he cannot, by waiver, make a court out of what is not a court. He may question the jurisdiction of the court over the subject matter after entering a general appearance.

100. **Choice, as between dilatory pleas.**—If any sufficient cause exists for a dilatory plea to the action, the attorney representing the defendant should enter only a special appearance. Dilatory pleas, as we have seen, are: (1) Pleas to the jurisdiction of the court; (2) pleas in suspension of the action; and (3) pleas in abatement of the action.[36] We also learned that these pleas should be used in the order named, as the defendant could not question the court's jurisdiction over his person after having asked it to pass upon either the suspension or abatement of the action, though if the court has no authority to try an action of that character, the defendant may raise that question at any time. The defendant will wish to file a dilatory plea, when he feels that he will have a greater opportunity to defeat another action brought in a different court or under different conditions, or thinks the postponement of the trial by its abatement will be to his advantage.

[36] § 25.

The defendant usually prefers to defend an action at his own home within his own county or township. Some courts hold that a judgment by default against a resident of the state who is a resident of another county may be set aside on motion, and the action abated, while others hold that the defendant sued in the wrong jurisdiction must raise the question in the first instance. But the student will learn of these matters in the study of other subjects, and we shall only consider what is necessary to make pleas in abatement sufficient.

If the defendant cannot deny the jurisdiction of the court but there is some reason why the plaintiff has no right to prosecute the action at that particular time, as when the plaintiff is a citizen of a country with which his country is at war, defendant should file a verified plea setting up the fact, and ask the abatement of the cause until conditions permit the action to be prosecuted.

101. **Use of pleas in abatement.**—Pleas (or answers) in abatement relate either to the person of the plaintiff, to the person of the defendant, to the pleading filed, to the service of the summons, or to some other fact not appearing upon the face of the pleading, but which deprives the plaintiff of all right to maintain that particular action at that time, and under the conditions under which the action is being prosecuted. Pleas in abatement are used where there is another action pending in another court between the same parties involving the same matters, where there is a failure to join all of the persons necessary for the full determination of the suit be-

fore the court as parties to the suit, or when any of the other numerous conditions exist which show that the plaintiff cannot maintain his action in that court under the particular conditions then existing. None of the dilatory pleas present any question on the merits of the action, but only the question whether suit has been brought in the wrong place or the wrong court, or at the wrong time, or in the wrong manner, or whether there is some other obstacle to a finding and decision concerning the rights of the parties. An attempt by the defendant to gain a decision regarding the merits of the action by setting up a meritorious defense or denying the facts alleged by the plaintiff as constituting his action, waives his right to abate the action on account of facts for which it might be subject to abatement. A defendant cannot both deny the court's power to determine the plaintiff's right, and at the same time demand a hearing upon his own defenses to the action. Such an attempt merely overcomes the defendant's matter in abatement, and amounts to a submission to the jurisdiction of the court over the defendant's matter in abatement and the cause, in case the court is one which has jurisdiction to try that class of actions.

102. **Dilatory pleas must not embrace matters of defense.**—The defendant is not permitted to include matters of defense in a dilatory plea, nor to file a plea to the merits with such a plea, nor to file a dilatory plea after submitting a defense on the merits. Dilatory pleas are not favored by the law, and great particularity is required in pleading them. This rule applies with especial strictness in construing pleas

in abatement, and in pleas of this kind all presumptions are against them, so that a party attempting to set up a plea in abatement must not only directly allege all of the facts on which he relies, but must also negative any matter tending to avoid the effect of the pleas which would naturally suggest itself to the mind. Where a dilatory plea is sustained, the judgment is merely that the suit shall abate, and the court in no way decides the merits of the controversy.

If a dilatory plea is overruled the only judgment is that the defendant must plead over and pay the costs, which in some jurisdictions includes all costs of the action down to the time of the decision. In no instance does a decision on a dilatory plea decide as to the merits of the action.

103. **Demurrer to the declaration.**—If the defendant has no ground for a dilatory plea; or if he considers it best to waive the matters in abatement, or if his plea is overruled, he is then called upon to defend the action on its merits. He still has available as means of defense: (1) demurrers; (2) motions; and (3) pleas (answers) to the merits of the action. We will first consider the nature and effect of the demurrer. Where the defendant upon examination of the plaintiff's declaration (complaint) believes the plaintiff has not stated a cause of action, he can call for a decision of the court on its sufficiency by filing a demurrer to it. A demurrer is a written allegation in technical language, the legal meaning of which is that admitting the statements of the pleading to be true as presented and relied on

by the pleader, he has yet shown no cause why the party demurring is liable to an action or subject to a defense (as the case may be) under the facts pleaded.

104. **Judgment on demurrer.**—Under the early English common law, where the parties submitted a demurrer for the decision of the court the decision on the demurrer disposed of the case, and final judgment was given in favor of the party in whose favor the issue on the demurrer was decided. Under this early rule if the party pleading wished to amend his pleading he was compelled to ask for and obtain permission of the court to amend it before the demurrer was ruled upon. The party filing a demurrer took the risk of his legal judgment in calling upon the court for a decision as to the sufficiency of the pleading, since a decision upholding its sufficiency was a decision of the cause against him. Under modern practice the judgment on demurrer is that the defeated party plead over and amend, and final judgment is not rendered upon a ruling on demurrer unless the defeated party refuses to plead further. That is, unless the party whose pleading was held insufficient declines to amend it, or the party whose demurrer was held not to be well taken refuses to file a pleading denying or avoiding the cause of action or defense set up in the pleading which he has unsuccessfully demurred to.

105. **Forms of demurrers.**—The common law system of demurring, including the old practice as to the use of special demurrers, has been wholly or partly abolished by statute in all jurisdictions, and the reasons for which a demurrer may be filed are

now prescribed by statute in all of the states and in England.[87] Demurrers are available only where some defect appears on the face of the pleading. They are addressed to the sufficiency of the statement of facts, or to a misjoinder of causes of action, or a defect of parties, or are based upon such other grounds as may be named in the statute. Demurrers are also divided into two general classes: General demurrers and special demurrers. The old common law general demurrer to the declaration for want of facts, after setting out the proper title of the pleading, stated: "And the said defendant by ———— his attorney (or in his own proper person) says the declaration is not sufficient in law." The most common form of demurrer to a declaration or complaint, under the codes, sets out the proper title of the cause, and says that "The defendant demurs to the plaintiff's complaint for the reason that the said complaint does not state facts sufficient to constitute a cause of action." Special demurrers point out particularly alleged defects in the pleading, and show what element of a cause of action is lacking in the facts stated. Some states use the general demurrer, while in others none but a special demurrer for a specific cause is allowed. The statute of each state should be consulted as to the form and effect of the demurrer. Forms of demurring to a plea (answer) for failing to present a cause of defense, or to a replication for failure to avoid the defense pleaded, depend on the codes and practice

[87] Brown v. Duchesne, 2 Curtis 97 (U. S. Cir. Ct.), LEADING ILLUSTRATIVE CASES.

acts of the several jurisdictions, to which the student is referred.

106. **Challenging insufficient and indefinite pleadings.**—In those states where the general demurrer is allowed, and defects in the declaration (complaint) are not waived by pleading to the merits, it is ordinarily good practice to test the pleading by demurrer and to save an exception to the ruling, if the court decides against the demurrer. An available exception for use in reversing the judgment by an appeal is thus saved, if the declaration is insufficient, while no rights are waived or lost by demurring if the declaration is not really defective. Where the special or specific demurrer only is allowable demurrers are less common. If the declaration is insufficient and its defects are pointed out by a demurrer the plaintiff's attorney is apt to amend, and having his attention thus called to an essential fact in his case is more likely to prove his case at the trial than if no demurrer had been filed. In many cases a special demurrer thus serves only to educate the opposite party and to point out to him what is required to win his suit. A demurrer only questions the pleading for defects which appear from reading the pleading itself. Where the matter by which the pleading should be overcome does not appear on its face, such defense must be presented by a pleading setting it up as new matter to overcome the other party's pleading. That a pleading merely states the facts in a general way, though without sufficient particularity, does not make it subject to demurrer. Provisions are made by statutes to compel an indefinite

pleading to be made more definite, which in most states is accomplished by a motion to make more specific.

107. **Ruling of court upon a demurrer.**—Demurrers may be filed to any later pleading than the plaintiff's declaration or complaint where such subsequent pleading fails to meet fully the pleading it is intended to answer. The same questions as to whether it is wise to file a demurrer or is better not to file one, and the same reasons by which to answer these questions, apply in case of the later pleading which apply in presenting a defense to the first pleading. Where a demurrer is filed to a plea (answer) or replication, or other pleading subsequent to the plaintiff's declaration or complaint, the demurrer questions every pleading of the series theretofore filed; so that if the plaintiff files a declaration and the defendant sets up his defense by a plea of new matter, to which the plaintiff demurs, the demurrer questions the sufficiency of the declaration as well as the sufficiency of the plea. If the declaration is insufficient the ruling of the court may be in favor of the defendant, no matter how defective the plea may be in presenting a defense to a good cause of action. A poor plea is a sufficient defense to a bad declaration, for the poor declaration requires no answer.[38] The plaintiff has no reason to complain in such a case whether the ruling of the court carries the demurrer back to the declaration and holds it defective, or overrules the demurrer to the plea, hold-

[38] Clearwater v. Meredith, 1 Wall. 25 (U. S.), LEADING ILLUSTRATIVE CASES.

ing it sufficient, since each has the same force as constituting a ruling against plaintiff. The ruling against either party, either on sustaining or overruling a demurrer, under the practice in most jurisdictions, is that he plead over, unless he elects to stand on the alleged sufficiency or insufficiency of the pleading.

108. **Motions attacking defects in pleadings.**—At common law, where the declaration was not sufficient in form, that was a cause for demurrer. There being no required forms under the codes, such demurrers cannot be used; and by statute in most or all jurisdictions adhering to the common law system of pleading, defects in form are now reached by motion. In the code states if a pleading alleges sufficient facts to constitute a cause of action or defense, but alleges them in such general language that they do not sufficiently inform the opposite party of the nature of the matter pleaded, he may file a motion to require the pleader to make the pleading more specific. Sometimes the pleading is such that he might enforce a motion of this kind, but the light which it would give the opposite party as to the conduct of his side of the action would be greater than the information and advantage to be gained by insisting on the motion. In such cases a wise lawyer will not file it, but will resort to some other means of informing himself about the facts of the case. Where the pleading is so general that it gives the party filing it too great latitude in the introduction of evidence, or fails to give sufficient information of the precise nature of the facts, the opposite party has the right

to require that it be made more specific, and will ordinarily compel this to be done unless there is some good reason for ignoring the defect.

109. **Plea or answer—Common law rules.**—The defendant having appeared and either waived his right to present dilatory pleas, demurrers and motions, or, after presenting them and obtaining rulings thereon, is then ruled to answer, his next defense will be a plea to the merits of the action. Pleas to the merits are of two kinds: (1) pleas by way of traverse (denial); and (2) pleas in confession and avoidance. Before we take up these pleas (answers, or affidavits of defense as they are sometimes called) we will consider some of the rules governing the plea at common law, many of which must apply under any form or system of pleading, as follows: Rule I. "Dilatory pleas must be pleaded at a preliminary stage of the suit." Rule II. "Pleas must be pleaded in due order." Rule III. "Pleas in abatement must give the plaintiff a better writ or declaration." Rule IV. "After the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance." Rule V. "Upon a traverse, issue must be tendered." Rule VI. "Issue when tendered must be accepted." Rule VII. "There must be no departure in pleading." Rule VIII. "Where a plea amounts to the general issue, it should be so pleaded." Rule IX. "Surplusage is to be avoided." Rule X. "All affirmative pleadings which do not conclude to the country must conclude with a verification."

We will take up these rules by number, as the stu-

dent should commit them to memory, keep them all in mind, and not require their repetition for a full understanding of them. The first three rules might properly belong with the consideration of dilatory pleas, and the fourth might have been considered with the subject of demurrers, but they are here considered together, better to group them in the student's mind.

110. **Presentation of dilatory pleas.**—We have seen that if the defendant wishes to raise any question by a dilatory plea he should ordinarily file such plea even before he enters his general appearance.[39] It makes no difference whether the defendant has been properly summoned or not, or whether he lives within the jurisdiction of the court, or whether there is any other objection that might be raised to compel him to submit to the court, if he has already submitted to it. Entering a full appearance without objection is a submission to the jurisdiction. Likewise he must set forth any matter in abatement regarding the parties or the right of the plaintiff to prosecute the action on which he relies before he attempts in any way to gain for himself a hearing on the merits of the case. Everything in the action should proceed in order, and a party waiving a right or plea by proceeding to the next step in the action cannot ask for a hearing upon the matter waived. He cannot ask for the hearing of a matter rightly belonging in the latter part of the action, and after an unfavorable decision, turn the action back to a preliminary stage to try a question he has waived.

[39] §§ 99, 100.

The foregoing statement explains the reason for the first two rules recited in the preceding section. The third rule (§ 109) is to prevent the presentation of a dilatory plea unless it is really true that the plaintiff's proper remedy is in some other court or place, or at some other time, or under some different circumstances. He must have a remedy if he has suffered a wrong, and his action will only be abated in case it appears that there is some other way open for him to proceed which ought to be followed. This rule requires the defendant to point out some way by which the method of proceeding can be improved. If he claims he is sued under the wrong name he must state his true name. If he insists on a defect of parties he must point out who are the proper parties and show that they can be brought before the court. And if he pleads that he has been sued in the wrong county he must name the place where suit could lawfully be commenced. Whatever the defect alleged he must show how it may be remedied.

111. **Pleadings must tend toward an issue on the merits.**—After the preliminary stage, during which the defendant has the right to file dilatory pleas, each party must so frame his pleadings as to proceed toward a hearing of the action on its merits.[40] Under the common law, the only pleadings on the merits permitted to be filed were demurrers, and pleas either in denial or by alleging new matter to avoid the allegations of the opposing party. Under the later practice acts and codes, the parties may also make use of motions, but the statutory motion does a serv-

[40] § 109, ante.

ice performed by the special demurrer under the common law.[41] Under the common law the sufficiency of pleadings largely depended on following established forms, and defects in the statement of a cause of action or defense in matters of form were reached by demurrer, as well as defects in matters of substance. The abuse of the practice of demurring specially for defects of form has led to an almost universal substitution of the use of motions to challenge the form of pleadings. There being no forms recognized under the codes, a complaint which imperfectly alleges sufficient facts, by reason that the necessary facts are alleged too generally, or which otherwise fails properly and sufficiently to inform the opposing party, must be corrected by a motion to make more specific. A pleading which omits some essential element required to give the court jurisdiction, such as verification, if the pleading is one which the law does not permit to be entertained by the court without verification, or the signature of the party or his attorney to show the authority by which the pleading was filed, should be challenged by a motion to strike it out. Also if matter which does not properly belong in a pleading is erroneously inserted, the improper matter may be struck out on motion. The subject of demurrers has been considered in former sections,[42] and only pleas of denial and pleas setting up new matter will be discussed here.

112. **General and special traverse.**—Where the opposing party's pleading is clearly sufficient to withstand all motions and demurrers, or where the

[41] § 108.
[42] §§ 103-107.

right to file them has been unsuccessfully exercised or is waived, a party must plead to the facts stated in his adversary's pleading, as contemplated by Rule IV (§ 109).[43] This pleading may be either a denial of facts alleged by his adversary or the allegation of new matter to overcome those facts. The most frequent plea by a defendant at common law is the common traverse (denial) by which all or a material part of the allegations of the declaration are denied. And under the codes the plea (answer) most frequently used is the denial, either general as to all allegations of the declaration (complaint) or special as to one or more of its material allegations. The technical name of "special traverse"[44] was given to a form of pleading at common law by which facts inconsistent with some material part of the declaration were alleged in affirmative form, closing with a clause "absque hoc" (without this), specifically denying the allegation of the declaration contradicted by the special averments of the plea.[45] This form of plea is now seldom used. But the common traverse at common law is of two kinds: (1) The general issue, by which the cause of action alleged in the declaration is denied in general terms, and (2) such pleas of the general issue as deny only one or more material facts, such as "non est factum" (is not his deed), "nil debet" (never indebted), "not guilty," or "non cepit" (did not take).[46] And in like manner, pleas

[43] Stephen, Pleading (4th Am. ed.) * pp. 165-182.

[44] State ex rel. Barrell et al. v. Christman et al., 2 Ind. 126, LEADING ILLUSTRATIVE CASES.

[45] § 119.

[46] Stephen, Pleading (4th Am. ed.) * pp. 153-163.

of denial under the codes include pleas of general denial and pleas of special denial, the first denying all that is alleged in the declaration, and the other denying specially some one or more of its allegations.

113. **Same subject—General and special denial.** —In this country, in the code states and under some of the practice acts, a party may deny such allegations as he wishes to deny, and allege new matter, which, together with the partial denial, will constitute a defense.[47] At common law the denial of matters in a pleading was called a traverse, while under the codes it is called a denial. This denial (traverse) may be either general or special. The general denial goes to the whole of the action or defense alleged by the opposing pleader, while the special denial goes to some essential element or allegation of his pleading. Those code states requiring pleadings under oath contemplate only the denial of those matters as to which there is a good faith dispute. In states where the general denial is in common use, special denials are but little used unless also accompanied by a paragraph of general denial. The proper use of the general and special denial, and the pleading of new matter, present both legal and psychological questions. Where a plea of special denial will set out and emphasize the evidence to be offered at the trial in a manner to create a stronger impression of the facts favorable to the pleader on the minds of the jury or of the judges sitting as triers of the facts, it is well to use it, even though the same proof could be made under a general plea.

[47] § 109.

114. **Plea of general denial.**—One who uses a plea of special denial (traverse) should take care that it denies such essential elements of the other party's pleading as will defeat that pleading. Thus, in trespass or trover a special denial may dispute plaintiff's possession. In each case it must deny the essential element of the cause of action, defense, or replication it is designed to meet. Where the general denial (traverse) is fully allowed the special denial is frequently used, in cases where it may give an appearance of candor and fairness and thus create a favorable impression on the jury. A general denial is the proper defense where the defendant intends to deny, in whole or in large part, that the plaintiff's cause of action ever existed. At common law the common traverse or plea of the general issue denies, by a general form of expression, the matter alleged in the adverse party's pleading, instead of denying the particular facts recited "in the manner and form" alleged, as was the form of the special traverse.[48] Under the codes a common form is that the defendant "denies each and every allegation therein contained." The general denial (traverse) usually puts the plaintiff to the proof of his whole action, or the defendant to the proof of the whole defense alleged. Where the defendant files a general traverse to the plaintiff's declaration, it is called pleading the general issue. The general traverse at common law may be pleaded to any action but account rendered, and in some states the general denial may be pleaded in all ac-

[48] State ex rel. Barrell et al. v. Christman et al., 2 Ind. 126, LEADING ILLUSTRATIVE CASES.

tions. Under the common law the general traverse in each case has its own peculiarities, which will be considered hereafter. Where it is allowed under the codes, the general denial reaches every element of the plaintiff's action as alleged unless limited by other provisions of the code. One of the limitations on the use of the plea of general denial under the codes is in actions on written instruments. The codes usually provide that the execution of a written instrument on which suit is brought can only be denied by a pleading under oath, commonly called non est factum (not his deed). Where this rule prevails a pleading denying every allegation of the declaration (complaint), if not sworn to, simply denies the existence of the writing, and does not question its execution or truthfulness.

115. **Plea of non assumpsit.**—At common law the general denial in an action of assumpsit is called "non assumpsit" (did not undertake). It consists of a formal denial of the express promise or contract (the undertaking) alleged by the plaintiff. This carries with it a denial of all facts from which the promise might be inferred.[49] That is, it goes to the first element of the action and denies that there ever was a promise, and in no way questions the alleged violation of the contract. It covers any defense which would show that the promise never existed, because no promise was given, or because it was in violation of law, or otherwise absolutely void. Where the action is upon a special contract and not on an implied one, it puts the contract as alleged in issue,

[49] Stephen, Pleading (4th Am. ed.) * pp. 157, 160.

and the defendant may show in defense that the true contract was in fact different from the one alleged. If the defendant wishes to show fraud, or any other matter overcoming the contract, it must be alleged as new matter by way of confession and avoidance. If he wishes to show that he was not guilty of the breach he should plead a special traverse of the breach in the manner and form alleged. In fact, the plea of non assumpsit denies that the obligation ever existed in the first instance, as alleged, and any evidence which will overcome the existence of that obligation will be admitted under the plea.

116. **Pleas of nil debet, non est factum, and nul tiel record.**—Where the action is in debt, and is founded on a simple contract or a right under a statute, the proper general issue under the common law is "nil debet" (never indebted). This is a formal denial of the contract or of the facts from which the debt would be implied by law. Like non assumpsit, it denies the creation of the obligation, but does not deny the breach of it, and generally the same rules apply regarding the pleading of both of these defenses. Where the action is in debt on a writing under seal, the general issue at common law is "non est factum." This plea consists of a formal denial that the deed pleaded in the declaration is the deed of the defendant. But non est factum is a proper plea at common law only when the action is founded on a sealed writing. Where the action is not founded on a deed under seal, but a simple writing, nil debet is the proper defense. Like non assumpsit and nil debet, non est factum only denies the binding force

of the alleged deed and is not a defense to the alleged breach if the sufficiency of the deed is established.[50] Where the action is in covenant the general issue is "non est factum," as in actions in debt upon a sealed writing. It also is a formal denial that the deed is the deed of the defendant, and does not put in issue any other defense. Where an action is on a sealed instrument, the seal estops the defendant at common law from alleging that he did not promise, etc. If the deed is his deed he is bound, and his proper defense is to show that under the circumstances it is not his deed. Where the action is on a judgment, the general issue at common law is "nul tiel record." This plea only denies the existence of the record. It does not in any way raise the question whether or not the record is still binding.[51] In any of these cases, if the defendant wishes to show a release or other defense not covered by the general issue it must be specially pleaded.

117. **Pleas of non detinet, not guilty and non cepit.**—Where the action is in detinue, "non detinet" (does not detain) is the general issue. It is a formal denial of the alleged withholding of the goods. It only goes to the denial of the detention, and in no way denies that they were once in defendant's possession. Nor can the defendant in any way justify the withholding of the goods under this plea; all such defenses must be pleaded specially. Where the action is in trespass, "not guilty" is the general issue. It is a formal denial of the trespass alleged

[50] Stephen, Pleading (4th Am. ed.) * pp. 156, 159.
[51] Stephen, Pleading (4th Am. ed.) * pp. 101, 232.

by the plaintiff. Under this plea defendant may make any proof in denial of the trespass. The possession of the plaintiff being necessary to constitute it a trespass, the plea puts that possession in issue. If the defendant seeks in any way to justify the trespass the justification must be pleaded specially. Where the action is in trover, "not guilty" is also the general issue. It is a formal denial of the conversion of the property. It puts only the conversion in issue, which at common law includes the plaintiff's possessory title; though this rule has generally been modified, so that now the general rule is that the plea puts the conversion alone in issue. In trespass on the case the general issue is also "not guilty." It also puts in issue only the commission of the wrong, and no justification can be proved under it. Where the action is in replevin for a wrongful taking, "non cepit" (did not take) is the general issue. It puts in issue only the taking. Where the action is in replevin for a rightful taking but a wrongful withholding, "non detinet" (does not detain) is the proper plea of the general issue. This plea, like non detinet in the action of detinue, puts in issue only the detention of the goods. These defenses, like the other general issues, deny only the wrongful acts alleged and not the matters alleged by plaintiff to show the conditions surrounding the parties at the time of the wrong. In fact, the rule of the common law in each of these cases is only to allow a defense by denial of the wrongful act under the general issue and in no way to permit the defendant to confess that he committed the wrongs and justify

their commission under the general issue. All of the general traverses ended with a demand for trial in the following words: "And of this he puts himself on the country."[52]

118. **The general issue as a replication.**—Where the defendant at common law alleges matter of excuse in his plea the plaintiff is permitted to reply by a denial in general terms and is not compelled to traverse specially the matter alleged by the defendant. The plaintiff may reply that "the defendant, of his own wrong and without any such cause as in his plea alleged," committed the wrong complained of, and it is a sufficient traverse by way of replication. This plea may be used where the defendant pleads affirmative matter by way of excuse, but where the defendant pleads in justification by alleging facts showing authority for the act complained of, the plaintiff cannot use this form of general replication.

119. **The special traverse.**—Where the defendant at common law wishes to deny any of the matter alleged by way of inducement (that is, alleged to show the conditions under which the acts were committed), and for any reason is estopped to deny generally the plaintiff's right, he is compelled to use a special traverse (denial) of those facts. A special traverse differs from the general traverse in that it does not conclude to the country but concludes with a verification. Instead of demanding a trial with the words, "And of this he puts himself on the country," like a general traverse, it closes with the same words as the declaration, "And this he is ready

[52] Stephen, Pleading (4th Am. ed.) * pp. 156-161.

to verify." The special traverse alleges new facts in its first part, inconsistent with some fact alleged in the declaration, followed by an expression "without this" (absque hoc), after which it alleges the matter in plaintiff's declaration, which is denied by the plea. Where the defense is a denial of any matter of inducement alleged by plaintiff the special traverse is the proper plea. Where the special traverse is in proper form and contradicts an essential element of the cause of action the plaintiff is compelled to join issue upon it. The special traverse has been most often used where a landlord sued a tenant who wished to show that the landlord's title had expired, or where the defendant for some reason was estopped from directly denying the plaintiff's declaration. This plea is too full of technicalities and of too little use to be considered at length in this work. It has been almost entirely suspended by the codes and practice acts and amended rules of court now in force in the different jurisdictions.[53]

120. **Requisites of a good traverse.**—A traverse (denial) at common law should, in general terms, deny the allegations, or certain of the allegations, of the other party's pleading in the manner and form alleged. This is to put the adverse party to strict proof in establishing the facts as alleged and not simply to proof of the general effect of the allegations. The student should carefully read the form for the particular kind of plea or replication intended to be used and carefully follow it. In travers-

[53] For an illustration of the form of a special traverse, see State ex rel. Barrell et al. v. Christman et al., 2 Ind. 126, LEADING ILLUSTRATIVE CASES.

ing the other party's allegations he may deny an allegation of fact or an allegation of mixed fact and law, but he cannot traverse an allegation of law. If he wishes to question a matter of law he should do so by demurrer. Neither can he traverse a matter contained in a deed (which term embraces all contracts under seal), as he is estopped from doing so. He must deny that it is his deed, not merely aver that he did not covenant as expressed in the deed. This rule applies in all matters where he is estopped for any reason to deny the matters alleged by his adversary.

121. **Pleas of denial under the codes.**—The rules in regard to pleading a denial under the code are not uniform. In some states all pleadings must be verified under oath, and in those states the holdings are not uniform as to the force of this requirement in forbidding a general denial of facts, some of which may be true, even though the alleged cause of action does not exist. In other states the general denial is in common use. Where the general denial is recognized as a proper form of pleading it puts the plaintiff to the proof of his whole action. It also gives the defendant the right to introduce any evidence which will show that no cause of action ever existed in the manner stated by the plaintiff, including the right to negative any fact essential to a recovery by plaintiff. But the defendant does not have the right, under the plea of general denial, to prove mitigating circumstances or matter of estoppel, or that the contract sued on was voidable, or any other defense which does not really deny the facts that must

be proved to make out his adversary's case, or which involves an admission that the action once existed, but undertakes to show that it has been extinguished. Where the general denial is not recognized as a proper form of plea the defendant is required to deny specially the matters which he wishes to put in issue. In some states great latitude is allowed in the matter of denying the facts alleged, and also in pleading new matter, inconsistent paragraphs of answer being permitted to be filed together, if the pleader will brave the effect on the minds of the jury of confessing a fact in one paragraph while denying it in another. In other states pleadings are often struck out because the different pleas filed by the same party are so contradictory that they show lack of good faith. Any pleading may be introduced in evidence as an admission by the pleader, but its statements are subject to explanation and its weight as evidence is for the jury.

122. **Plea of confession and avoidance.**—If the pleader, at common law, wishes to set up new matter to avoid an action he is compelled to plead by way of confession and avoidance. The defenses thus pleaded are either of justification or excuse, or by way of discharge. Pleas of justification or by way of excuse, while admitting the facts alleged by the plaintiff, allege affirmative matter to show that the plaintiff did not at any time have a cause of action. The new matter thus alleged by the defendant is intended to justify, in law, the conduct with which he is charged by the declaration. Thus, a defendant sued for damages for an assault and battery may justify by alleging that the plaintiff attacked him and that he

committed the injury complained of in the necessary and proper defense of his person. Pleas by way of discharge admit that a cause of action once existed, but allege new matter showing that defendant's liability has ceased. Thus, a defendant may plead that he paid the note sued on and was released. Both of these pleas being allegations of affirmative facts, neither tenders an issue, but each closes with a verification and requires another pleading by the plaintiff to make an issue, either by way of a denial, or the allegation of new matter to overcome the facts stated in the plea and to carry the pleadings forward toward an issue. Pleas in confession and avoidance must admit, at least tacitly, that the facts alleged by plaintiff, in the form in which they are alleged constitute a cause of action, and must undertake to show that the new matter alleged by defendant deprives the plaintiff of all right to press his action against the defendant. If the new matter alleged by defendant amounts to a denial that the cause of action ever existed, so that it could be proved under the general issue, the plea is insufficient. This is because the law will not permit an unnecessary postponement of the issue, and the defendant, having the opportunity to close the issue by a traverse, is required to do so directly, and not indirectly by alleging affirmative matter which would help to support a traverse. This rule is intended for a good purpose, but when enforced, without regard to its effect, it sometimes works a hardship. To overcome the strictness of the rule great latitude is allowed for presenting a defense under a plea of confession and

avoidance, if it shows color (an apparent right in plaintiff). Under many of the codes a person may plead his defense either by a denial or by alleging affirmative matter amounting to a denial of some material part of the cause of action; though denying by merely asserting the opposite is never commendable, even in jurisdictions where it is permitted.

123. **Same subject—Giving color.**—A confession of the cause of action, giving color (an appearance of right) to the other party's pleading, is an essential element of a plea in confession and avoidance at common law. As we have seen, a defendant who wishes to deny even the color of a right on plaintiff's part to maintain his action should do so by presenting a traverse and bringing the issue to a close, thus relieving the court and the plaintiff from the burden of filing useless pleadings. This rule requiring color to be given has produced much and extended reasoning and many distinctions. Color has been classified as express color and implied color. Implied color is where the defendant states matter not inconsistent with the allegations of the declaration, and his own averments impliedly recognize the sufficiency of the plaintiff's cause of action as pleaded, except as such action is defeated by the new matter alleged. Express color is where the defendant sets up an assumed and fictitious state of affairs as lending color to the plaintiff's cause of action, and then alleges new matter of defense to overcome the plaintiff's supposed case. The plaintiff is then forbidden to deny the fictitious matter thus alleged by his adversary in his favor, and is compelled to join issue on the

new matter of defense. The practice of using express color was adopted to get away from the strictness of the rule that the defendant must at least give color to plaintiff's action, and is used where the circumstances require new matter of defense to be pleaded, but do not permit the defendant in fact to confess the circumstances and conditions to be as alleged by the plaintiff. A full discussion of the subject of "color" would not be useful in this article, for much of the learning with relation to it is obsolete. But the student may find entertainment in reading Mr. Stephen's explanation of the subject of color.[54]

124. **Traverse and acceptance of issue.**—Rule IV (§ 109), requiring a party to demur, traverse, or confess and avoid at each stage of the action, is designed to promote the closing of the issue.[55] It only requires a party denying the pleading of his adversary to tender an issue on the matter denied so that a hearing may be had and the rights of the parties determined. The tender of an issue where the rights of the parties are not to be determined by mere reference to a record is a formal allegation at the close of the pleading as follows: "And of this he puts himself on the country." This is a formal request for a trial by jury and was originally used because the early English practice provided for trials by battle, and by walking on hot plowshares, and by oath, as well as by jury. The form of this conclusion remains, with all its legal meanings, though some of the reasons for its adoption have ceased to exist. The conclusion, "And this the said defendant is ready to

[54] Stephen, Pleading (4th Am. ed.) *pp. 202-215.
[55] § 109.

verify by the record," is still used in pleading a judgment of record as a defense, but all other forms of tendering issues are obsolete. Rule V (§ 109) compels a party who denies the facts alleged by his adversary to offer to submit the controversy for trial. Rule VI (§ 109), that "Issue when tendered must be accepted," only requires that the party whose pleading has been traversed (denied) shall accept the tendered issue and go to trial on the pleading which he has filed. There being no need for further pleading and the issue being upon the grounds alleged by such party, this was the only natural course. The issue may also be an issue of law instead of fact, and in that case the party is also compelled to join issue after his adversary has filed a demurrer. This issue, like the issue of fact, being upon matters alleged by himself, there is no reason to delay a hearing and decision of it. For these reasons a party is compelled to accept an issue whenever tendered. It requires merely a trial upon the field chosen by himself to which his own pleadings led the cause in reaching an issue.

125. **Departure not permitted.**—Rule VII (§ 109), that "there must be no departure in pleading," is designed to compel each party, plaintiff and defendant, to go forward in the same direction toward the formation of an issue through the whole series of pleadings in a case.[56] A "departure" is where a party in a later pleading of the same series deserts the ground taken in the next preceding pleading filed by him in the same case and resorts to another ground distinct from the basis of his former pleading

[56] § 109.

and not supporting it. There may be a departure by undertaking to allege facts inconsistent with what a party has previously pleaded, or by abandoning the legal ground on which a cause of action or defense set up by a prior pleading is founded and attempting to base a reply or rejoinder on a different legal ground. Neither a departure in matters of fact nor in matters of law is allowed, but the record must be a continuous whole, each successive step being based on the former proceedings in the case. A departure is not permitted under any system of pleading or method of forming an issue. Thus, where the complaint counted on an alleged fraudulent representation concerning goods sold, and the plaintiff, by his reply, set up that the defendant promised to pay the alleged damages, the court held that under the code this constituted a departure because the action was for a tort and the plaintiff, by his replication, attempted to support it by alleging a contract.[57] To permit a complete change in the nature of the case by way of reply would be, in effect, to countenance the beginning of a new action by that means, whether the change is in regard to the facts or as to the law under which the action is prosecuted. Even in the states using codes of practice a party cannot totally change the nature of the action by amendment, so that it becomes a new and entirely different kind of action in law involving an entirely different basis of liability and a different remedy.[58]

[57] Frank Brewing Co. v. Hammersen, 22 N. Y. App. Div. 475, 48 N. Y. Suppl. 30.

[58] Supervisors of Kewaunee County v. Decker, 34 Wis. 378, LEADING ILLUSTRATIVE CASES.

126. **General issue must be pleaded as such.**—Rule VIII (§ 109) requires that where any matter of defense set up by plea is in effect a denial of the whole or the principal part of the plaintiff's declaration, the defendant must plead such defense under the form of the general issue. This rule is so qualified as to permit the defendant to plead in confession and avoidance by giving color to the plaintiff's declaration, either by impliedly admitting plaintiff's right as alleged or by alleging fictitious matter to give the declaration express color, as was shown in another section.[59] Sometimes a defendant wishes to assume the burden of the issue in order to obtain the opening and closing of the trial and argument. At common law where his defense is really a denial of the action the rule under discussion would prevent the defendant from assuming the burden of the issue as having pleaded an affirmative defense, were it not for this exception. The rule was originally adopted to prevent confusion in pleadings by the presentation of new pleas when recognized pleas were available. An illustration of the operation of the rule is seen where a defendant sued for trespass for entering plaintiff's garden pleaded that plaintiff had no such garden; here it was held that the defense, coming properly under the plea of not guilty, was insufficient and amounted to no plea at all, and the defendant was required to enter a plea of not guilty.[60]

127. **Surplusage.**—Rule IX (§ 109) commands that surplusage be avoided.[61] Surplusage is matter

[59] § 123.

[60] 22 Year Book, 10 Hen. VI. 16 (Eng.).

[61] § 109.

contained in a pleading which is not necessary to the statement of the cause of action or defense. A good pleader will confine himself to the matters constituting his cause of action or defense without alleging what is unnecessary. Where surplusage is pleaded either at common law or under the codes the opposite party may move to strike it out if he considers it prejudicial to his case. A demurrer will not reach this defect if the pleading is otherwise sufficient. The party pleading surplusage takes the risk of the other party being able to gain some advantage from it, and if he can gain no advantage from it the adverse party may have it struck out at the pleader's cost. Unnecessary allegations sometimes prejudice the party who pleads them, while he cannot gain any advantage from them, because they will be struck out if his adversary demands it and he will not be permitted any benefit from them even if there is no motion to strike them out.

128. **Conclusion of pleas.**—Though many of the traverses at common law are in form affirmative, they are always in effect mere denials of what the opposing party has alleged. This being the case, the common traverse always ends with a demand for a jury trial in the words: "And of this he puts himself on the country." Where a party pleads new matter (there being as yet no issue) a demand for a trial would be premature. And as new matter in a pleading requires verification by proof at the trial, unless its truth is confessed by the adverse party in his next pleading, all pleadings at common law which do not tender an issue so as to require a

demand for a trial must close with a verification in the following form: "And this the said (name of pleader) is ready to verify." Where the new matter pleaded is a record the concluding clause is worded thus: "And this the said (name of pleader) is ready to verify by the said record." There are some other secondary rules concerning common law pleadings, but they have no place in an elementary treatise.

129. **Defenses must always be pleaded.**—A defendant must ordinarily plead any defense which he wishes to use at the trial whether it be a denial, or new matter, and any defense not interposed by plea or demurrer is ordinarily treated as waived. There are some exceptions to this rule, as matters of law and other things of which the court takes judicial notice, and like matters, as heretofore stated, need not be pleaded. It has been held under the codes that where a contract was void on its face, its invalidity need not be set up specially as a defense.[62] But unless the attorney is certain that the matter relied on as a defense comes within an exception, and has some authority in the form of a statute or court decision to prove to the court at the trial that there is such an exception, he should always lay the foundation for his defense by properly pleading it.

A defense can only be pleaded by a party in whose favor it exists and not by someone else who is in no way entitled to its benefit. Some defenses, such as fraud and estoppel, are personal defenses and can only be pleaded by the party in whose favor they originally existed unless the circumstances are such

[62] Gil v. Williams & Davis, 12 La. Ann. 219, 68 Am. Dec. 767.

that equity will apply the rule of subrogation in favor of another party who seeks to interpose them as defenses. At common law equitable defenses were not recognized. But all proceedings under the common law have now been somewhat modified to allow the application of certain rules permitting equitable defenses, though these modifications were all made by statutes which differ in the several states, and which each student must consult in his own state.

130. **Defenses generally.**—In most of the states it is provided by statute that a person joined as a party defendant may disclaim any interest in a property to which the title is disputed and may thus escape liability for the costs of the action where he has in fact not invaded or interfered with the plaintiff's right. The disclaimer should be full and complete, and when made is binding as a record against the one who pleads it and establishes his lack of title. Where the defendant has no interest but only an appearance of title shown by records and papers, and another owns the real interest, many states allow the person owning the real interest, at his own request, to be made a party defendant and to defend the action. Where a defense accrues after the action is begun the defendant may set it up. Under the common law he might plead such new defenses against the further continuance of the action where they arose before his plea was filed. If they come into existence after the plea has been filed, an additional plea called a plea puis darrein continuance (occurring since the last continuance)

must be filed, setting up the new defenses. Under the code, defenses arising after the commencement of the action may be set up in the answer, but they must be specially pleaded as having so arisen. The rules of the court, the statutes, and the practice of each particular court control as to the time given in which to plead or answer. Where there are several defendants they may generally either join in their defenses or defend separately, as they desire, each party pursuing the course he considers best. This is true even though the same attorney represents all of the defendants in presenting a joint defense. Where the parties sever their defenses the answer of one defendant cannot ordinarily be used against another defendant. In no event is it conclusive against any other defendant than the one who filed it, even though they are partners.[63]

131. **Partial answers—Set-off and counterclaim.** —In most of the states a defendant having a partial defense may plead it as such by answering only as to that part of the cause of action to which it affords a defense. But if a partial defense is pleaded as an answer to the whole action it will be insufficient. At common law a defendant could not set off one cause of action against another on which he was sued, though recoupment of a sum due the defendant on the same contract was sometimes permitted. But many of the states, by statute, now permit a defendant to plead, by way of set-off or counterclaim, a demand upon contract which would support an independent suit, as a defense or partial defense to an

[63] Grunenberg v. Smith, 58 Ill. App. 281.

action on contract. Matter so presented must be sufficiently pleaded to show a right of action in the defendant if he were bringing an independent action as complainant against this plaintiff as the defendant in such action. Where pleas of set-off and counter-claim are permitted they may be pleaded with an answer in bar but not with pleas in abatement. The Statute of Limitations, fraud, estoppel, or other special privilege, must always be set up by plea to be available as defenses.

CHAPTER IX.

THE PLAINTIFF'S SECOND PLEADING, THE CLOSING OF THE ISSUES, AND JUDGMENT.

132. **Replication—Plaintiff's second pleading.**—At common law if the defendant pleads anything but a traverse the plaintiff must reply. His replication, as it is called, must fully meet all new matter pleaded by the defendant. It may be either a denial or the statement of new matter which avoids the defense pleaded in the answer (or a combination of new matter and denial, where that is allowed by statute), the same as the plea.[64] At common law a replication of general denial was permitted to be pleaded in very general terms unless the defendant had pleaded new matter in justifying under an authority or title. The common law forms of replication were numerous and each had a different conclusion, for which the student is referred to any book of common law forms.

Under the law of many states if the defendant's pleading contains new matter the plaintiff is required to meet it as fully as the defendant was called upon to meet the plaintiff's first pleading or declaration. In some of the states no reply to defendant's plea (answer) is required, and the plaintiff is only required to plead again in case the defendant has

[64] Clearwater v. Meredith, 1 Wall. 25 (U. S.), LEADING ILLUSTRATIVE CASES.

pleaded a set-off or counterclaim. In those states where the replication is used the plaintiff has a choice of demurrers, motions, or pleas in bar, to meet the defendant's plea or answer. The demurrer has been considered in preceding sections. The same rules govern the filing of motions attacking the plea or answer which govern in the case of motions by the defendant relating to plaintiff's declaration (complaint). If neither of the remedies, by demurrer or motion, is adequate the defendant must plead in bar. At common law his plea in bar of the answer was called the replication, as above suggested, while under the codes it is called the reply. Under most of the codes the reply is the last pleading of the series and is treated as denied without a rejoinder. But under the common law the parties must continue to plead alternately until one or the other pleads a traverse (denial) and an issue is thus reached.

133. **Replying new matter.**—The plaintiff, in setting up new matter in his replication, must be careful that it is consistent with the allegations of his first pleading (his declaration). If the declaration (complaint) and the reply to the defendant's plea (answer) thereto are contradictory or inconsistent, this will constitute a departure, and the replication will be insufficient to withstand a demurrer. What has been said under the rule against departure applies in such case.[65] Thus, where a complaint under the code counted on an alleged fraudulent representation concerning goods sold, a reply setting up a promise by defendant to pay the damages

[65] § 125.

claimed was a departure.[66] Matter which may be proved under the allegations of the first pleading (declaration) need not be alleged as new matter in the replication, but is fully available if a reply of denial is filed. No reply (replication) is necessary to affirmative matter in the defendant's plea (answer) which furnishes no ground of defense to the action, nor is it proper to file a replication to a plea of counterclaim or set-off. Pleas of counterclaim and set-off are treated as declarations, and pleas (answers) to them must be filed after the manner of answering the original declaration. Most of the states allow several paragraphs of replication to each plea or answer, but a few states still confine the plaintiff to a single reply to each plea as at common law.

Where several paragraphs of reply are permitted the same rules apply to each paragraph on the question of departure.

134. **Closing the issues and trial.**—Under the common law each pleading in succession may confess and avoid the preceding plea as long as the parties can continue this practice without either party traversing (denying) what the other has alleged, there being no fixed limit to the number of pleas required to reach an issue. Also when a traverse is pleaded and issue is joined the inquiry is only as to the fact denied, which sometimes has little bearing on the cause of action stated in the

[66] Frank Brewing Co. v. Hammersen, 22 N. Y. App. Div. 475, 48 N. Y. Suppl. 30. (This was an attempt to change an action in tort so as to support it by a contract.)

declaration. But the statutes known as codes and practice acts have limited the number of pleadings which may be filed in any series in nearly all jurisdictions.

Some modern statutes permit the filing only of a declaration and a plea or answer, and others provide for a declaration, an answer, and a replication. Each pleading of a series is ordinarily permitted to contain more than one paragraph, each of which may, in turn, be answered or replied to. But after the replication is filed (or after the answer is filed, if that is the last pleading provided for), it is deemed to make an issue even though it contains affirmative allegations, the affirmative matter being treated as if denied without a formal plea.

135. **Same subject.**—In most of the states which provide for filing a replication the defendant has the right to attack it by motions or demurrers, but if not attacked, or in case the attack is unsuccessful, it closes the issues, the law implying a denial of any new matter which it alleges. Where other pleadings, such as a rejoinder, surrejoinder, and rebutter, are permitted, they are presented, tested by demurrer or motion, and answered under the rules governing the declaration, answer, and reply. When the issues are closed at whatever stage of the pleadings, the case stands for trial in its turn, when reached by the court. It is then given a date for trial by the court, either by agreement between the attorneys for the parties, approved by the court, or on the court's own motion. Continuances will ordinarily be granted by the court to another time, upon agreement of the

attorneys for the parties or upon an affidavit by either party showing sufficient cause. Finally, when the case comes up for hearing, either before the judge or the jury, the issues formed by the pleadings in the case control the evidence which may be introduced, and any instructions to be given to the jury, and the scope of the judgment to be rendered after the trial has ended, whichever party recovers. The pleadings and the issues thereon are the foundation of the trial and judgment, and furnish the measure of what is to be inquired into, of what shall be decided, and what relief shall be given to the complaining party, in case he proves that he has been wronged.

136. **Verdicts and findings.**—In most of the states the statutes give a party the right to have a special finding of the facts by the judge, in case the trial is before the judge alone. Where this is asked the attorneys should each prepare a statement of all the facts which they think the evidence establishes, since facts supporting each element of the case must be found to support a finding for the plaintiff, or to overcome facts found for the plaintiff, where the decision is in favor of the defendant.

In trials by a jury some of the states provide for special verdicts, while others permit interrogatories to be answered by the jury. Where the jury only renders a special verdict, such verdict, like special findings by the judge, must find each element of fact necessary to support the decision.

The issues formed on the pleadings determine, in legal measure, the effect of a special finding, a special

verdict, or answers to interrogatories, since it is only those facts so found which are also alleged in the pleadings that can determine or affect the judgment to be rendered.

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PRACTICE IN CIVIL ACTIONS

BY

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PART I

PREPARATION FOR TRIAL

CHAPTER I.

BEGINNING SUIT.

1. **Praecipe.**—A civil suit at law is usually begun by the filing of a praecipe with the clerk of the court. This is, in effect, a written order directing the clerk to issue a summons to the defendant or defendants named in the praecipe. In some jurisdictions a praecipe must be filed before a writ is issued. In most jurisdictions the clerk of the court may waive the formal filing of a praecipe and issue the writ upon the filing of a declaration, statement of claim, or complaint. The praecipe should correctly set forth the names of all parties to the cause, the term of the court at which the defendant must

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appear, the direction for the issuance of a summons, and the signature of the plaintiff or his counsel.

2. **Who should be parties plaintiff.**—It is the general rule that any natural person may be made a party plaintiff in an action at law, and usually this rule will include all persons whether they are citizens or aliens, adults or minors, incompetent or insane. There are, however, exceptions to the rule, one of which is that a person who is regarded by the law as civilly dead cannot be a party plaintiff. In some jurisdictions this includes persons who have been convicted of a felony and sentenced to a term of imprisonment in a penitentiary. In most of the states the rule does not extend to convicted persons unless by the law the estate of such person has been forfeited.

In practically all jurisdictions an artificial person, such as a corporation, may be a party plaintiff, whether such corporation be foreign or domestic. Most of the states have passed laws restricting the rights of foreign corporations to prosecute actions within their jurisdictions, and require that before an action can be maintained by a foreign corporation, the prescribed regulations governing its right to sue must have been specifically followed. Unincorporated clubs and societies by special statutes may sue and be sued in their own names. An action cannot be maintained in a mere trade name, because it has no legal entity. It is a general rule that the plaintiffs in an action must be the real parties in interest. However, an action may sometimes be brought involving property rights in the names

of the parties who hold both the legal title and the beneficial ownership to the property involved, or in the name of the party who is either the legal or the beneficial owner.

3. **Who should be parties defendant.**—It is a rule of universal application that all parties defendant must have a legal entity and must have in some manner infringed the rights of the plaintiff. An unincorporated company, association, club, or society may, however, be sued in its own name by virtue of special statutes. This was not permissible under the common law, the rule of which prevails in some states to this day and requires that in order to recover against an unincorporated organization the individual members thereof must be sued. Not all legal entities, however, may be made parties defendant in an action though they may have infringed upon plaintiff's rights. It is usually provided by statute that states and counties may not be made parties defendant in actions brought in their own courts; and in jurisdictions where felons may not sue as parties plaintiff, they may be sued as parties defendant; parties under legal disabilities, such as minors and insane persons, can only be sued through their guardians, conservators, or other legal representatives.

4. **Who may be made joint plaintiffs.**—Under the common law all the persons to whom the defendants were legally answerable for the injury complained of must be made parties plaintiff, in the action. If several persons were legally answerable to the defendants for a grievance, an action in the

name of one of them could not be maintained. It was equally true that if the action was several there could not be a joinder of plaintiffs, but each one injured could maintain his action against the defendants. The common law rule has been greatly modified in most of the states, and many actions that were formerly joint or several are now by statutes made joint and several.

5. **Misjoinder and non-joinder.**—The misjoinder of plaintiffs in actions growing out of a breach of a contract is fatal, but the burden of showing that too many persons are joined as plaintiffs is upon the defendant. A misjoinder of defendants is equally fatal, but the defect may usually be cured by amendment. A failure to join, in actions ex contractu, all the defendants jointly liable is erroneous, and advantage of it may be taken at any time during the progress of the proceeding. The rule, however, is different in tort actions; a misjoinder of plaintiffs in such actions will usually defeat a recovery, while a misjoinder or non-joinder of defendants will not. A verdict against one of several joint tort defendants gives no ground for complaint by that party because the other defendants were not included in the verdict; nor is a non-joinder of defendants, all of whom may be liable for an action ex delicto, erroneous. In most of the states amendments are freely permitted, to cure both the non-joinder or misjoinder of either plaintiffs or defendants.

6. **Service of writ.**—The service of a summons is required to give notice to the defendant that he is

a party to the proceeding. Jurisdiction of parties is only obtained by the service of process. The particular method of obtaining service is governed by statute and differs in different jurisdictions. It is always requisite that the direction of the statutes be specifically followed. Service in most cases must be made by the sheriff or bailiff of the court. In some instances, it may be made by private persons deputized by the court for that purpose. In no event, however, can a person interested in the outcome of the cause be permitted to serve the process. It is requisite that such service be had within the territorial jurisdiction of the court issuing the writ. Special statutes provide for service upon persons residing outside the jurisdiction of the court, but such service cannot give the court jurisdiction to render a personal judgment. Service may be made in some states by delivering a copy of the writ to the defendant, or by reading the same to the defendant, or informing him of its contents.

7. **Motion to quash the return.**—Upon the return of the writ by the executing officer, the defendant, if he desires to avail himself of any error in the service or return, should at once file a motion to quash the return or the writ itself. Any error appearing upon the face of the writ or of the return may be reached by such motion to quash. For instance, if it appears to have been served outside the jurisdiction of the court, or outside the time limited by the terms of the writ, or by one not duly authorized to execute it, advantage may be taken of such defect by a motion to quash. If, however,

the defect in the writ or in its return is not apparent upon its face, advantage must be taken of such defect by a plea in abatement. Among defects cognizable by plea in abatement are fraud in enticing the defendants within the jurisdiction of the court, service upon exempt persons, such as members of legislatures, judges, jurors, etc., or service upon the wrong party. Leave may be given to amend the return as to its form, but if quashed a new writ may issue in the same action.

8. **Pleadings.**—The subject of pleadings is treated in another part of this work, but mention of it here is necessary, because the character of the pleadings to such a large degree determines the methods adopted in the trial of the cause. For illustration: If to the common law declaration is joined the plea of the general issue, the burden of proving every allegation rests upon the plaintiff. If, however, as is now the case in many jurisdictions, instead of the common law pleadings the plaintiff is required to file a simple, detailed statement of his claim, verifying the same by affidavit, and the defendant is required to file a concise, verified statement of his defense, answering in detail the items in plaintiff's claim, then the trial, instead of throwing upon the plaintiff the burden of proving everything material to his case, obligates him to prove only such matters as are not controverted by the defendant's affidavit. This requires a much closer examination of the pleadings and oftentimes a complete change in the manner and order of introducing evidence.

9. **Written interrogatories.**—The practice has quite generally been adopted of allowing either party, after a cause is at issue, to file written interrogatories directed to the opposing party and to obtain from the court an order requiring such opposing party to answer under oath such interrogatories within a fixed day. The character of such interrogatories is usually determined by the court. If the party ordered to answer, either refuses to answer or answers evasively, he may be punished for contempt or directed to answer over, or if party plaintiff, his action may be dismissed, and if defendant, judgment may be entered against him as by default. When a corporation is a party, the interrogatories should be addressed to it, and a refusal to answer may be punished in the same manner as in the case of an individual. A corporation when ordered to answer cannot refuse, on the ground that it is an artificial person and cannot give testimony, but the answers must be given in the name of the corporation by any officer or agent who possesses the information called for.

CHAPTER II.

PRELIMINARY MOTIONS.

10. **Motion for judgment on the pleadings.**—If it appears upon the face of plaintiff's declaration or complaint that the court is without jurisdiction to try the cause, the defendant should move for judgment at the earliest opportunity, or if when the defendant has filed his pleas, it appears upon the whole record that such pleas are not sufficient in law to defeat the action, plaintiff should move for judgment. In some jurisdictions the usual motion under such circumstances is to strike from the files an adversary's pleading and for judgment.

11. **Default.**—By default is meant failure of a party to the suit to take one of the steps in the progress of the lawsuit required by law or rule of court. If the defendant fails to enter his appearance the plaintiff is entitled to a default and judgment. The manner of taking such default is dependent almost entirely upon statutory enactments or rules of court. When a party to an action is defaulted for want of an appearance or for a failure to take any other step arising in the course of the proceeding, such default may be vacated by promptly applying to the court and presenting, by means of affidavits, the causes which led to the default. The vacation of default orders rests in the sound discretion of the court. Prompt action in

making an application is always necessary, and if the term at which the default was entered is allowed to go by, the court is usually left without jurisdiction to reinstate. The motion to set aside a default may be granted upon condition of paying costs or without such condition. Care must be exercised in applying for a default and judgment, that defaults are taken only against the parties who have been properly served. Where there are several joint parties to an action, some of whom have appeared and filed pleas and others have not, a default may be taken against those who have been properly served and have not appeared, and a verdict against those who have appeared. In actions ex contractu default and judgment against certain joint defendants who are served and failed to appear, and a judgment in favor of other joint defendants who have answered, is erroneous and must be set aside. In actions sounding in tort a judgment may be taken in favor of one or more joint defendants and against other defendants in the same action. In such actions a judgment against part of the joint defendants will operate as a dismissal against all other defendants in the cause.

12. **Change of venue.**—The strict meaning of the word "venue" is the place whither the jurors are summoned to come. Changes of venue are allowed upon two grounds: Because of the prejudices of the inhabitants of the place where the trial is to be held, and because of the prejudice of the trial judge. The meaning of the term was originally confined to the former ground, but it is now generally used

in both senses. In order that a change of venue may be granted for any reason, it is always required that the application for such change be made at the earliest opportunity, after the knowledge of such prejudice has come to the mind of the moving party. The right to a change of venue may be waived either by delay in making the application, or in some cases, by pleading to the action without objection, or by entering into stipulations affecting the rights of the parties in the cause. Changes of venue will not be granted merely for delay. In order to entitle a party to a change of venue because of the prejudice of the judge, it must appear that such prejudice is against the complaining party. A prejudice against his lawyer is not sufficient.

Of course, the application for the change of venue must be made to the judge before whom the case is pending, and in many jurisdictions that judge, if the application is made in accordance with the express provisions of the statute, has no discretion, but must grant the change. In other jurisdictions, the granting of the change of venue is discretionary with the trial judge. In practically every jurisdiction in the United States a change of venue is purely a statutory right and will not be granted unless the statute has been specifically complied with. In order that the prejudice of a judge can be urged as a ground for a change of venue, it must be alleged in the petition for such change that the petitioner believes he cannot secure a fair trial before such judge.

13. **Motion to advance the cause.**—It frequently happens after a cause is at issue that, for some reason, it is important to have the action tried at an early date. If counsel for either party desires to have a cause advanced from its regular place upon the trial calendar to which it has been assigned by the clerk of the court, he should make a written application to the court supported by affidavit, setting forth the particular reasons why such cause should be tried out of its regular order and ahead of other causes that have been pending for a longer period of time. The motion is directed to the discretion of the trial judge and usually will be granted, if the reasons given therefor are such as would warrant the conclusion that injustice will follow if the cause is not advanced. Serious illness, or a necessary departure from the country are proper considerations for such a motion.

14. **Motion to continue the cause.**—It much more frequently occurs that one or more of the parties to an action will not be prepared for trial when the cause is reached regularly upon the calendar. Often the witnesses are beyond the jurisdiction of the court or the parties are sick or unable for some reason to appear in court, or the nature of the action is such that sufficient time has not been allotted the parties to properly prepare for a trial of the issues. In all such cases proper application must be made to the trial judge at the earliest opportunity to continue the cause, either to the next term of court or to some subsequent date, when the cause for the continuance will have been removed. All such ap-

plications for continuance should be supported by proper affidavit of the parties. If one or more of the parties or their counsel are members of congress or of a legislature the law generally requires that the cause be continued until the adjournment of such legislative body.

15. **Setting a cause for trial.**—It is usual for the clerk of the court at stated intervals to make up a calendar of cases which are to be called for trial in the order in which they were filed in court. In some jurisdictions it is error to call cases out of the regular order unless an application upon proper notice has been made to the court to advance such cause or to set it for trial at some specially named date. In most jurisdictions a preliminary call of such calendar is made by the court at the opening of each term of court, and the cases are at that time set for trial on definite dates. It will not generally be held reversible error to call a case out of its regular order unless the party complaining can show that he has been injured thereby.

CHAPTER III.

NON-JURY CASES.

16. **Trial by court without a jury.**—Nearly all state constitutions preserve to every citizen the right to a trial by jury in civil actions at law, as well as in criminal matters. It is, therefore, often urged that such right can in no way be abridged or taken from the citizen. In England the right to a trial by jury in civil matters rests generally in the discretion of the court, and in practice in that country less than one per cent of the actions at law are tried by a jury. The usual practice in the United States has been to require the plaintiff, upon bringing his suit, to pay to the clerk of the court a fee sufficient in amount to cover the expense of the trial by a jury. In some jurisdictions, however, the practice has more recently been adopted of leaving it optional with the plaintiff when he files his suit to demand a jury trial. In these jurisdictions, if the plaintiff wishes a jury trial he must make a written demand therefor and pay a certain stipulated jury fee. If, on the other hand, he desires his case to be tried by the court without a jury, the fee required to be paid by him is much less than where a jury is demanded. If the plaintiff fails to demand a trial by jury the defendant upon entering his appearance may demand such trial and pay the customary jury fee, or he, too, may waive trial by jury and pay the

lesser fee required under such circumstances. While the constitutions of the several states grant to all litigants the right to trial by jury, such right does not imply that a litigant is entitled to the services of the jury without cost, but is a right of the same nature as the right to have all other official services performed by public officers upon the payment of certain required fees. If the jury is waived the court is required to assess the damages as well as to determine all other issues of fact.

17. **Reception of evidence by the court without a jury.**—In a trial of the issues by a court without a jury, the evidence is received in the same manner as if a jury was in the box, and the parties desiring to object to any evidence because of its incompetency or immateriality, or for any other reason, must make such objections during the progress of the hearing, and secure from the judge a ruling thereon. Upon a review by a court of appeal of the evidence heard, in common law actions, by a court sitting without a jury the same presumptions are indulged in reference to incompetent and immaterial evidence as are held by chancellors sitting as judges of both the law and the fact, it being presumed that the court considered only competent and material evidence in making its finding.

In some jurisdictions it is required that in order to preserve an exception to the ruling of the court upon any question arising upon the trial it is necessary that an exception to such ruling be taken and noted in the record. In most jurisdictions, however, it is not necessary during the trial to take for-

mal exception to the rulings of the court upon receiving or rejecting evidence offered, but such exceptions save themselves and are open for review on appeal or error.

18. **Submission of propositions of law or fact.**— In order to preserve the rulings of the trial court for review upon questions either of fact or law, counsel for either party is generally required by law to submit to the court written propositions and request the court to mark the same as, "held," or "refused." If it is desired by either party that the trial court make a specific finding upon any question of fact, he may incorporate such finding of fact in a written proposition and submit the same to the court, or if it is desired to preserve for review specific propositions of law arising in the course of the trial, a party should submit to the court in writing such propositions, and in some jurisdictions the court has no discretion but must mark all such propositions so submitted and file the same for record in the cause. In some states it lies within the discretion of the court to make specific findings upon such propositions. Some courts of appeal have the right to review questions of law only, while others may review both questions of law and fact. Unless propositions of law have thus been submitted to the court sitting without a jury, and the court has indicated its finding upon each of such propositions, there is nothing for a court of appeal, which has jurisdiction to pass upon questions of law only, to review. Where an appellate court has jurisdiction of questions both of law and of fact, it is not

generally necessary to submit propositions of law to such court.

19. **Findings of law and fact by the court.**—After the evidence has been submitted to the court sitting without a jury the cause is open for argument of counsel in the same manner as if it were heard by a jury, and the cause is not finally submitted until such argument has been closed. The court is required to make its finding both upon questions of law and fact, such finding when entered of record having the same force and effect as the verdict of the jury. This finding, however, may be amended or modified in any particular by the judge making the same, during the term or within such time as the court has jurisdiction of the cause. The defeated party may make a motion either for a new trial, or in arrest of judgment, or both. Such motions will generally be disposed of at once, but may be reserved for future consideration. If they are overruled judgment will be entered upon the finding.

20. **Judgment on finding.**—The judgment when entered upon a finding of law and fact by the court has the same force and effect as a judgment upon a verdict, and is conclusive of the issue unless set aside by a court having jurisdiction to review it. Errors in the entry either of the finding or of the judgment may be corrected by the court during the term at which the same were entered. Errors, however, that appear clearly upon the face of the record may be corrected after term time.

21. **Appeal and error.**—In seeking a review of a judgment entered by a court without a jury the

defeated party has substantially the same remedies as in a case tried by a jury. By reason of the presumptions indulged in favor of the court's findings upon the question of fact, that only competent evidence was considered, although incompetent evidence may have been heard, the defeated party cannot urge error on account of the reception of such evidence. Execution may issue upon such judgment at any time after the same has been entered, unless the judgment debtor at once takes such steps as are necessary to secure an appeal, and a stay of execution. It is always required that in prosecuting an appeal or writ of error, the statutes be strictly followed. Any deviation therefrom will generally result in the dismissal of the appeal or writ.

CHAPTER IV.

JURY TRIALS.

22. **Right to a jury trial.**—The right to a trial by jury was first guaranteed in the Magna Charta, but was exercised in a limited way prior to the granting of that instrument. The English colonists settling in America brought with them this practice, and the constitutions of substantially all of the early colonies provided that the right to a trial by jury should remain inviolate. Gradually, by statutory enactment the right to a trial by jury was limited to certain kinds of actions, until in most of the American jurisdictions it is now denied in equity and probate proceedings, and in certain other forms of actions. It has generally been guaranteed in all state constitutions for all forms of civil common law actions, the particular method of securing a trial by jury being reserved for the determination of the legislatures of the several states.

By a jury is usually meant a body of twelve men possessing certain defined qualifications, and competent under the particular statutory enactment. In some states less than twelve men under certain circumstances may constitute a valid jury.

23. **Qualification of jurors.**—The qualification of jurors is left to the determination of the legislative bodies of the several jurisdictions. It is universally required that the jurors be physically able to per-

form their duties, that they shall be able to see, hear, and to otherwise possess such a degree of health as will enable them to give proper attention to the evidence in the case. They must also have certain educational and intellectual qualifications, and be able to understand the ordinary terms used in the conduct of a trial. It is required that jurors be drawn from the county, district, or from within the jurisdiction of the court to which they are summoned. Some states require that jurors shall possess certain property qualifications and usually it is required that they be citizens residing in the district where the court is held. But few jurisdictions now require property qualifications for jurors.

24. **Jury lists.**—At the common law no jury lists were prepared, and in some jurisdictions today, when a jury is required in the trial of a cause, the sheriff is usually commissioned to summon the required number of jurors for a particular case, or for a term of court. It is the general practice in the several states and jurisdictions to prepare jury lists of persons eligible for service. The effect of such statutory provision is to take the selecting of jurors out of the hands of the sheriff and place it in the hands of jury commissioners, whose duty it is to prepare in advance a proper list of the men who are eligible for jury service, and to certify such list to the clerk of the courts where the jurors are to serve. Jury commissioners in selecting these lists are usually not limited to any particular method, except it is required that the names must be selected without distinction from all the persons of the county or

district qualified to serve. In large municipalities the list is usually made up from the names appearing in the city directories. In making up the list it is requisite that the names of those who are exempt from jury service shall not be included. Usually attorneys, judges, ministers of the gospel, teachers, and judges and clerks of election are exempt.

25. **Drawing the jury.**—It is usually the practice to have a box in each court room where a jury is required. In this box are placed all the names of jurors assigned for service in that court during the term. When a case is called for trial it is the duty of the clerk to draw the names from the box, and unless good reason is shown, it is required that the jurors take their places in the jury box in the order in which their names are drawn. In practice it frequently happens that the names are called, in regular order, from a list furnished to the clerk, and the jurors are required to take their places in the order in which their names are called.

26. **Examination of jurors by the court.**—The duty of examining jurors, in most instances, rests upon counsel in the case. However, in many jurisdictions that duty is primarily placed upon the judge, who may examine the jurors himself or may delegate such examination to the counsel representing the parties in the action. If it is desired by counsel for either party to challenge the array it is necessary that such challenge be made at the earliest opportunity.

27. **Examination of jurors by counsel.**—The purpose of an examination of jurors preliminary to the

trial is three-fold: that the parties litigant may determine whether or not they desire to challenge the array, to challenge the jurors peremptorily, or to challenge them for cause.

One of the greatest abuses of our American trials is the long drawn out examination of jurors by counsel. In this examination the inquiry must be specifically directed, first to the determination of whether a challenge to the array should be allowed; second, to the determination of whether one or more of the jurors are disqualified for service, either because of physical, mental, educational, or intellectual deficiencies, or because such juror may be in some way connected or related to one of the parties to the action, or may be exempt or incompetent for some other reason; and third, whether or not the party examining wishes to exercise a peremptory challenge. On the ground that the party may desire to exercise such peremptory challenge, because of bias or prejudice, wide latitude is usually permitted in the examination of jurors, and the trial, in a strongly contested case, is often unnecessarily prolonged thereby.

28. **Challenge to the array.**—In civil actions, a challenge to the array is unusual, and such a challenge is only entertained by the court where it is made to appear definitely that the jury lists were improperly prepared, the jury panel improperly drawn, or the jury summoned from without the jurisdiction of the court. The fact that some of the jurors in the panel are incompetent for service is not ground for a challenge to the array.

29. **Challenge for cause.**—The right to challenge a juror for cause is coincident with the right of trial by jury, for the right to a trial by jury presupposes that the jury shall be made up of men who are unbiased, and who are otherwise competent to serve as such. In some states the right to challenge for cause, is limited by special statutes. Usually the challenge must be based upon some disqualification of the juror which would render him incompetent to serve in the case before the court. In the earlier stages of trial by jury it was the practice to call but one juryman in the box at a time and counsel were required to examine him fully, and exercise the right of challenge before another juror was called. Under nearly all of the present statutes, however, counsel will not be required to exercise the right of challenge before the panel has been filled by twelve jurors. The right to challenge a juror for cause must be exercised before the juror has been sworn to try the case. If, however, ground for the challenge appears after the juror has been sworn the court may excuse the juror, but a refusal to excuse such juror is not reversible error, unless injury to the party complaining is shown.

30. **Peremptory challenge.**—A peremptory challenge is one made without assigning any reason therefor. It is an absolute right guaranteed by the statutes in the several jurisdictions, and cannot be limited or restricted by the court, nor can the court require the party exercising the challenge to give a reason therefor. No such thing as a peremptory challenge existed at common law, and the practice

is controlled purely by statutory enactment. The number of jurors who may be peremptorily challenged in civil actions varies in different jurisdictions and is usually from two to five. The number allowed in criminal actions is much larger than in civil actions. As a general rule the latitude permitted in the examination of jurors, for the purpose of exercising peremptory challenges, rests in the discretion of the court and such questions will be allowed as are necessary to properly test the bias of the juror. The fact that a juror is prejudiced against an unlawful business is not ground for challenge for cause, nor is it proper to ask a juror in a case, where the conduct of an illegal business is involved, whether or not he is prejudiced against such business. It is generally permissible, however, to ask questions touching such prejudice for the purpose of exercising peremptory challenges.

31. **Swearing the jury.**—It is usually the practice to reserve the swearing of the jury until all the jurors have been selected and the parties have had an opportunity to exercise their challenges. It was formerly the practice that jurors were sworn one by one immediately at the close of their separate examinations. It is not essential that a juror be sworn in civil actions, and if the parties proceed to trial without an oath having been administered, it will be presumed that they meant to waive the formality of an oath. No particular form of oath has been generally adopted. Some legislatures have prescribed the form of oath to be taken by jurors. The usual oath merely requires that the jurors shall

well and truly try the issues joined between the parties and a true verdict render. Where a default has been entered and the jury is called to assess damages only, a different form of oath should be used, the jury being then required only to well and truly assess plaintiff's damages. The oath is generally administered by the clerk of the court, but it may be given by the judge or by anyone else who has authority to administer oaths.

PART II

THE TRIAL

CHAPTER V.

OPENING STATEMENTS—EXCLUDING WITNESSES—DEPOSITIONS.

32. **Court reporter.**—In many states it is required that a court reporter be present during the entire progress of the trial and report, in detail, all that is said during the trial. In some jurisdictions the presence of a court reporter is not required by law, but the parties to the action, if they desire the case reported, are required to provide for the presence of court reporters. Where no official court reporter is employed, and the parties furnish their own reporter, the preparation and certifying of a bill of exceptions becomes a matter of more concern to the parties and greater care is required in order that a correct transcript of the proceedings be presented to the judge for his certification.

33. **The right to open and close.**—The question as to which side shall open and close is one which must be determined before any evidence has been received, and before counsel has addressed the jury. It is not always easy to ascertain which party is entitled to this advantage. Hence in many jurisdictions the determination of the question lies

wholly within the discretion of the judge. In general, however, the party which asserts the affirmative of an issue has the opening and closing, for the reason that upon him rests the burden of making out a prima facie case. It is sometimes said that the party is entitled to the opening and closing which would prevail, under the issues joined by the pleadings, if no evidence was heard. Wherever the plaintiff is required to offer any evidence whatever to make out his prima facie case he is entitled to the opening and closing and that right cannot be granted to the defendant unless he admits the whole of the plaintiff's claim, and assumes the entire burden of making out his defense. Where suit is brought upon a note, draft, or check, the plaintiff will be entitled to the opening and closing, although upon the trial his whole case is made by offering in evidence these instruments sued upon. Where a suit is brought upon such commercial paper, and the defendant admits the execution and delivery of the instruments sued upon, but pleads payment or tender, he has the right to open and close, and the same is true in actions of libel and slander, where the words spoken are not denied but the defendant pleads justification.

34. **Opening statement.**—The opening statement of counsel to the jury must not be an argument upon the law and facts involved in the case, but must be confined to a statement of the evidence which he intends to present to the jury. It is not permitted that counsel shall argue what this evidence tends to prove. It is required that the facts stated shall

be of such character that they may be susceptible of proof. If in the opening statement by counsel to the jury facts are stated, which in the very nature of the case are not susceptible of proof, it will be erroneous, and such error may be urged upon a court of review. The opening statements of the parties are binding upon them, and in some jurisdictions judgment may be entered at the close of plaintiff's opening statement, if in making the statement he has failed to state a cause of action. Usually, however, counsel in making opening statements are not held to such a strict rule, and may be allowed to add to the statements, or to introduce evidence of matters not contained in them. Counsel in making his opening address may state the principles of law applicable to the facts, as he proposes to prove them, but will not be permitted to argue the law or to give his opinion thereon. The opening statement of the plaintiff is usually followed by an opening statement by counsel for the defendant, wherein he is permitted to state the facts upon which he bases his defense and the law applicable to such facts. It often occurs that the defendant in order not to reveal the whole of his defense to his adversary, requests the court to be permitted to reserve his statement until the plaintiff has closed his case upon the evidence. This request lies within the discretion of the trial court and is often granted, but it is not error for the court to refuse such request.

35. **Swearing witnesses.**—There is no uniformity in the methods of swearing witnesses. In many

courts it is the practice to call all the witnesses to the bar of the court, before any evidence is received, and have the oath administered to them in a body. The practice in others is to swear each witness separately as he takes his place upon the witness stand. The latter method has met with the greatest approval, by reason of the fact that the oath administered under such circumstances is more likely to impress the witness with the responsibility of his situation. In many jurisdictions the most difficulty arises when some of the witnesses speak a foreign tongue, and in order to administer the oath to them an interpreter must be used. No particular form of oath has been prescribed for witnesses in most of the states, but the oath administered in the several jurisdictions does not vary in any essential degree.

36. **Excluding witnesses.**—It is a common practice for counsel on either side to request the court to enter an order excluding all witnesses, except the parties, from the court room until such time as they may be called. It is sometimes required that the witnesses so excluded, shall be separated and not be permitted after they have reached the court to talk or confer with each other. The usual rule does not go to that extent, but merely requires that witnesses who are waiting to be called shall not be permitted to hear the testimony of the one upon the witness stand. The granting or refusing of the request for the exclusion of witnesses lies within the discretion of the court, and while an order for the exclusion of witnesses may be granted, the court may except from that order certain witnesses whom it may be

desired by one or the other of the parties, to have present with them in court to assist in the examination of witnesses, and the conduct of the trial. Usually the rule excluding witnesses does not extend to witnesses in rebuttal only. Where a rule has been made excluding witnesses, and some of them violate the rule, by appearing in court and listening to the testimony given from the witness stand, the court may refuse to permit such witnesses to testify, or if, in the judgment of the court, their presence in the court was through some mistake or misunderstanding, and no harm was done to the opposing party, the court may permit or refuse to permit them to testify. The application for the exclusion of witnesses must be made before any evidence has been heard, and a motion of exclusion will not be heard after any part of the evidence has been introduced.

37. **Depositions—Written interrogatories.**—Depositions may be taken in substantially all forms of civil actions, and the laws governing their taking are altogether statutory. No original right to take depositions, except in equity proceedings, exists outside of the statutes. Such depositions are usually taken for the purpose of perpetuating the testimony of witnesses, or for obtaining and preserving the testimony of witnesses who either reside beyond the jurisdiction of the court, are about to leave the jurisdiction of the court, or who, by reason of their physical disability, are unable to attend the sessions of the court. There are two general methods of taking depositions—one, upon writ-

ten and the other upon oral interrogatories. In both cases it is of the utmost importance that the statute governing the taking of such testimony be strictly followed. If it is desired to take the depositions upon written interrogatories notice must be previously given to the opposing party of the application for a commission to take such deposition. It is also required that the interrogatories which are to be asked of the witnesses be filed with the clerk of the court at the time such notice is given. If the party receiving the notice desires to object to the taking of the depositions, or to the form or substance of the interrogatories, he is required within the time prescribed by the statute to make and file his objections in writing. If he desires to file cross-interrogatories he must do so within the time granted. The issuing of the commission, while in some cases resting wholly within the discretion of the court, is usually a matter of course, and the objections, if any, that are urged by the opposing party, are preserved for a motion to suppress, after the depositions have been taken. It is usual to have the commission issued to some judge, magistrate, or notary public, but the parties may, by stipulation, agree upon some person who holds no official title to take such deposition. If the form of the written interrogatory is not objected to before the commission is issued no objection for that reason can be urged thereafter, but objections as to competency, relevancy, or materiality may be made at the trial.

38. **Depositions — Oral interrogatories.** — The most frequent method of taking depositions is upon

oral interrogatories. It is always requisite before such depositions are taken that the particular notice prescribed by the statute be given, and that the deposition be taken at the time and place designated in the notice. The commissioner, however, has the power, for good cause shown, to continue the taking of such depositions from day to day. If both parties are represented by counsel, at the taking of such depositions, all objections to the form of the questions are waived, unless made at the examination. If, however, such objections are made at the taking of the depositions they will be reserved until the hearing of the matter before the court upon a motion to suppress or upon the trial of the cause. It will often lie within the discretion of the court to sustain or overrule such objections even though the interrogatories be leading in form. If upon the examination of a witness before the commissioner irrelevant, incompetent, and immaterial evidence is offered, and no objection is made at the time, objection to such testimony may be later urged upon a motion to suppress or upon the trial of the cause. When the testimony has been concluded before the commissioner it is his duty to cause the witness or witnesses to sign and swear to such depositions and then to properly certify the same under his official seal and forward them to the clerk of the court in which such depositions are to be used. If, after the opening of such depositions the opposing party desires to object to them, either because they have not been properly taken or certified, or for any other reason which, if the objection was sustained,

would result in the depositions being suppressed, a motion to suppress must be promptly made in order to give opportunity to retake the depositions, if such course becomes necessary. If prompt action is not taken, such objections will be waived. The commissioner generally has no power to rule upon objections made to evidence offered, but must note such objections at the time they are offered, in order that they may be heard by the judge trying the case.

CHAPTER VI.

EXAMINATION OF WITNESSES—NON-SUIT—DIRECTED VERDICT.

39. **What plaintiff must prove.**—If the action is local it is necessary that venue be proven in civil actions. If the action is transitory it may be brought either where the cause of action arose, or where the defendant is, and it is not necessary to prove venue. All actions involving an injury to land must be brought in the county or district where the land is situated, and it is necessary to prove that the land is located in such county or district, while actions for personal injury or for the recovery of money in assumpsit are transitory, and may be brought in any jurisdiction where the plaintiff or defendant may reside or where neither of them may reside, providing only that the defendant is served with process in the county or district in which the action is brought. Plaintiff must also prove every material allegation set forth in his declaration or statement of claim, unless under the statute or rules of court, governing the practice, all allegations of fact made by the plaintiff and not specifically denied by the defendant are admitted of record. In jurisdictions where no pleadings are required, nothing is admitted by the defendant and the burden of proving everything necessary to make out a case rests upon the plaintiff.

40. **Examination of defendant by plaintiff.**—In many jurisdictions it is expressly provided by statute that either party to an action has the right to call the opposing party to the witness stand and examine him under oath, touching the matters in issue, and it is usually provided in such cases that the parties so examining shall not be bound by the answers of the opposite party. The effect of the latter provision is to permit the party examining, if he desires, to offer other testimony which might impeach, or tend to impeach, the testimony of his adversary. In most cases where this rule has been adopted it has been held that when one party is called for cross-examination by his opponent, the party thus cross-examined will not be permitted at the close of such cross-examination upon his own motion to go into other matters, but must reserve whatever testimony he desires to offer until his side of the case is heard. Under this rule officers of corporations, plaintiff or defendant, may generally be called by the opposing party and cross-examined.

41. **Examination of witnesses.**—There is no fixed rule in reference to the order in which witnesses for either party may be called, and the parties are usually permitted to determine for themselves in what order their testimony shall be offered. In some instances, the court in the exercise of a sound discretion may require certain proof to be offered before certain other proof is received. Nor is there a fixed rule as to the number of witnesses each party may call to prove an issue, the parties being permitted generally to offer within reasonable bounds

as much cumulative evidence as they desire. It has, however, been frequently held by courts of review, that the court may in its discretion limit the number of witnesses that may be called to prove a particular issue. Where such discretion is exercised it must be to place the same restriction upon both parties. The testimony of witnesses who are incompetent under the statute may be received, if no objection is offered.

42. **Cross-examination.**—The right of cross-examination by either party of his adversary's witnesses is one which cannot be denied and which can only be abridged by the exercise of a sound discretion on the part of the judge. The cross-examination of a witness must be confined to the subjects covered in the direct examination. A cross-examination which unnecessarily prolongs the trial, or which travels beyond the direct examination, may be restrained by the court. Neither party is permitted to cross-examine his own witness, but, if the witness is hostile, a wider latitude in examination is permitted than would otherwise be allowed.

43. **Voluntary non-suit.**—If the plaintiff, either before he enters upon the trial or at any time during the progress of the trial, concludes that for any reason he desires to proceed no further, he may move for a non-suit, and in most jurisdictions the court has no discretion, but must grant the motion unless a set-off has been filed. It frequently arises that by reason of the absence of witnesses, or a failure on the part of the plaintiff to obtain certain proof, which he had expected to secure, he finds himself

in a position where he is either unable to make out his case, or the case made out is of such a character as renders him unwilling to submit it to a jury. Under such circumstances he has the right to ask for a non-suit. If the case is being tried by the court without a jury the plaintiff may move for a voluntary non-suit up to the time when the cause has been submitted to the court for decision. If the case is tried by a jury it is generally the law that the plaintiff retains his right to a voluntary non-suit until the jury has left the jury box. If the defendant has filed a set-off the plaintiff will not be entitled to a voluntary non-suit, but the court may in its discretion grant the non-suit.

44. **Involuntary non-suit.**—An involuntary non-suit usually arises in cases where the plaintiff has failed to take some step in the proceeding, within the time required by law, as the filing of a declaration or other pleading, or where the plaintiff fails to appear upon the call of a case for trial. It often arises because of a misjoinder or non-joinder of parties.

Where an involuntary non-suit has occurred additional time is usually granted to the plaintiff in which to file a new suit, although the statute of limitations may have run. It is important if the plaintiff finds himself unable to make the necessary proof to sustain his cause of action, and the statute of limitations has run, instead of asking the court for a non-suit, he should secure an involuntary non-suit by allowing his cause to be dismissed for want of prosecution.

45. **Motion to direct verdict.**—When all of the evidence of the plaintiff has been received, the defendant, if he thinks a case has not been made out, may move the court to direct a verdict in his behalf. Such motion operates as a demurrer to the evidence. Upon the hearing of it the court is required to determine whether or not, taken altogether, the plaintiff's evidence proves or tends to prove his claim. Upon this motion the evidence and every reasonable inference that may be drawn from the evidence must be taken as true. Nor can the court consider the credibility of the witnesses. If this motion is granted, it is the usual practice for the court to direct the jury to sign a written verdict for defendant.

The jury has no discretion in the matter, and will not be permitted to retire to the jury room to consider the evidence. The refusal of a juror to sign the verdict may be punished as a contempt of court. The right of the court to direct verdicts in this manner is not an infringement upon the right of trial by jury, for the reason that the only question involved upon such a motion is a question of law and not one of fact, and juries in civil cases are allowed to pass upon questions of fact only. At the close of all the evidence offered by either side the plaintiff may make a motion to direct a verdict in his behalf, if he thinks the evidence of the defense does not sustain his plea. The court is, upon this motion, required to determine whether or not the evidence offered on behalf of the defense is in law a defense to the plaintiff's case. The same presumptions are indulged on this motion in behalf of the defendant

as were allowed on behalf of the plaintiff's evidence. Defendant's evidence and every reasonable inference therefrom must be taken as true. If this motion is allowed the court may direct the jury to find a verdict for the plaintiff, and it has no discretion in the matter, but must obey. If, at the close of plaintiff's evidence or at the close of the whole case, the motions to direct verdicts have been overruled, and the parties making the same desire to preserve an exception for review in a court of appeal, it is necessary, in most jurisdictions, that written instructions, directing such verdict, be presented to the judge, and the judge shall mark the same refused. It will not be sufficient to hand such instructions to the judge at the time other proposed instructions are offered.

46. **Objections and exceptions.**—If either party desires to preserve for review the rulings of the court upon receiving or rejecting evidence, it is necessary, in all jurisdictions, that objections be made at the time such evidence is offered, and the judge be called upon at the time to rule upon such objections. An exception to the rulings of the court should be taken immediately after the court has made an adverse decision. It is now the rule in many courts that no exceptions are required to be taken after the court has ruled, but that exceptions will be allowed upon the record. An objection which is not followed up by a ruling of the court will not avail the objector, but on review will be considered as having been waived. If either party objects to the argument of opposing counsel, it is necessary, in

order to preserve an exception, that the court rule upon such objection. A mere objection without such ruling will be of no avail.

The purpose of preserving exceptions is to make it manifest to the reviewing court that the trial court had ample opportunity to correct the alleged error. Exceptions ought to be taken, not only to the evidence admitted, but also to the adverse decisions as to all motions and other rulings by the court.

CHAPTER VII.

CHARGING THE JURY—VERDICTS.

47. **Submission of instructions.**—In many state courts the law requires that instructions to juries must be in writing, and must be confined wholly to questions of law. In eight or ten states it is optional with the judge to instruct the juries orally or in writing. The methods of preparing and giving written instructions differ in the several jurisdictions. In some states the whole procedure is governed by statute. In others the particular method is prescribed by rules of court. Where written instructions alone may be given it is usual for counsel on both sides to prepare the instructions beforehand and to present them to the court immediately upon the close of the evidence. The judge is then required to examine all such instructions submitted and to mark them "given" or "refused." The party whose proposed instructions are refused is allowed an exception, and the question of whether such instruction should or should not have been given, is open for review, while the defeated party in any trial, by a jury, is allowed an exception to each instruction of his opponent marked "given," and read to the jury. In some jurisdictions it is required by rule that before the final argument to the jury is made, the instructions shall be settled. This is usually done by each party, out of the presence of

the jury, offering to the court the instructions which he desires read to the jury, and the judge thereupon calling upon the opposite party to present such objections as he may have to the giving of such instructions. If no objections are offered the party failing to object will be estopped from afterwards urging error upon the same. It is required that in presenting instructions to the court they should be offered as a series, should be clear, definite and concise, and shall not be contradictory of each other.

48. **Argument to the jury.**—The party upon whom rests the burden of proving the issue, has usually the opening and closing of the argument to the jury. The right to argue a case to the jury is absolute, and a denial of such right is error. Whoever opens the argument to the jury is required to argue all questions upon which he relies for a recovery and he will not be permitted to refer in his closing argument to questions not discussed in his opening. He may, however, waive the opening argument. If, having waived his opening argument, his opponent also waives argument, he will not be permitted to make a closing argument. In the argument to the jury, it is permitted that the pleadings in the cause, or such part as counsel desires to bring particularly to the attention of the jury, be read. It is not allowed, however, in civil actions, that law books be read to the jury. The time allotted to make an argument rests within the sound discretion of the judge, and his decision will not be reviewed unless it has been abused. A reasonable latitude is permitted counsel to review the evidence in the cause,

but reference to evidence that has been stricken out of the record, or to matters concerning which there is no evidence in the record, is erroneous; and an argument intended to inflame the passions and prejudices of the jurors is ground for reversal.

49. **Charging the jury.**—There are two general methods of charging jurors, either by the judge reading to the jury certain instructions which have been prepared by himself or by counsel on opposing sides, or by instructing them orally. There is a lack of uniformity on this subject in the several jurisdictions. Originally the judge in instructing juries had the right to charge them concerning the law applicable to the issues in the case, and to express an opinion upon the weight of the evidence and what such evidence tended to prove. Gradually by statutory enactment judges have been limited to giving instructions upon questions of law only, and are not generally permitted to express an opinion upon the weight of the evidence or whether or not it tends to prove the issues in the case. Where instructions are given orally counsel usually have the right to present in writing suggestions to the court in the form of requests to instruct the jury upon certain specified subjects. The judge is at liberty to accept or refuse such suggestions, and no error is allowed because of the refusal of the judge to give such instructions. In charging juries orally, the judge has always the power to sum up the evidence, but he has generally no right to express an opinion upon its weight or upon the credibility of witnesses. Whatever the instructions given by the court, they must

be based upon the evidence and must be confined to a statement of the law applicable to the case. If the court in summing up the evidence makes a misstatement thereof, exception may be taken thereto, and usually must be taken, if at all, before the jury has retired from the box. It is the rule in the federal courts that a defeated party, in order to preserve an exception to an error committed by the judge in giving oral instructions, must make objections immediately at the close of the judge's charge, and before the jury has retired from the box. If objections are not then made they will have been waived.

50. **Deliberation of the jury.**—Immediately after receiving the charge of the court, the jury is placed in the hands of an officer of the court, and taken to a room for its deliberations. It is usually held erroneous to permit the jury to separate after leaving the jury box before it has reached a verdict. It is proper for the jury, after having arrived at its verdict, to seal it, and separate until the reassembling of court on the following day or at some subsequent time. While it is the practice not to permit jurors to separate during their deliberation, yet to permit it will not always be held reversible error. It is improper during the deliberation of the jury for anyone to enter the jury room and converse with the jurors other than the officer in charge, and he may do so only to the extent necessary to properly perform his official duties. The presiding judge may not enter the jury room and talk with the jurors on any matter relating to the trial. He may give additional instructions to the jury, but this should

be done in the presence of opposing counsel. Jurors are required in nearly all civil actions to pass only upon questions of fact, and must base their verdict upon the evidence in the cause. It is usual to permit the pleadings in an action to go to the jury, together with all documentary evidence introduced in the cause. Usually the instructions when in writing may also be taken to the jury room. It is never permissible in civil actions to read law books to the jury, either during the argument or while the jurors are deliberating upon their verdict.

51. **Verdict.**—Usually no particular forms of verdicts are prescribed by statute. The forms used are generally prepared by the clerk of the court. Any form may be used which makes it possible for the jury to readily express its intention in the simplest way. Originally all verdicts were delivered orally in open court, but gradually the practice was changed so that now in most jurisdictions the verdicts are in writing, signed by the jurors. It is not error, however, in courts of record, for the judge to receive the verdict pronounced orally in open court by the foreman of the jury. Where written verdicts are required it is not absolutely necessary that they be signed by the jurors, although such practice has been generally adopted. The verdict of the jury must express the deliberate judgment of the members of the jury acting collectively. A verdict that is arrived at by chance, collusion or duress will be set aside.

52. **Reception of verdict.**—Verdicts must be received in open court, unless an express agreement

has been entered into between the parties that they may be received otherwise. The court has the power to direct the jury to sign and seal the verdict, then separate, and at a later time present such verdict in open court. Unless an express stipulation has been made between the parties the court has no right to discharge the jury after it has reached a verdict without first having such verdict presented in open court. The defeated party always has the right to poll the jury. By polling the jury is meant to ask of each juror separately, in open court, whether or not the verdict returned was, and is, his verdict. In some jurisdictions the right to poll the jury lies wholly within the discretion of the trial court. Where such right is reserved to the parties it may be waived by the stipulation of the parties, allowing the verdict to be signed, sealed and delivered in open court on the following day after the jury has separated. When a jury has once separated after sealing its verdict, it will not be proper, at a later date, to permit counsel to poll the jury. A verdict returned by a jury is of no binding force until it has been received and recorded. If, in polling the jury, a juror answers that the verdict returned is not his verdict, the verdict cannot be received and recorded.

53. **Amendment of verdict.**—It is the duty of the court when verdicts are returned to see that they are put in proper form. This may be done either in the presence of the jury or after the jury has been discharged. No amendment, however, by the court, out of the presence of the jury, can be made except

as to form. The court, however, before the jury has been allowed to separate, may ask the jurors to again retire to further consider their verdict, and to change it either in matter of form or substance. If the jury has been permitted to separate, after finding its verdict, it may be directed by the court to reassemble and amend its verdict as to form only. After a verdict has been received and recorded, and the jury permitted to separate, no juryman will be allowed to impeach his verdict for any cause whatever. Verdicts may be impeached, after they have been recorded, and the jury permitted to separate, because of improper conduct on the part of the jurors, or because of the illegal manner in which the verdict was arrived at. Where the amount of the verdict is in excess of that claimed by the plaintiff such error may be cured by a remittitur entered of record upon the motion of the plaintiff. Any motion by either party to correct a verdict as to form or substance must be made at the earliest opportunity; if as to substance, before the jury has been allowed to separate; if as to form, it should be made during the term at which the verdict was rendered.

CHAPTER VIII.

ENTERING JUDGMENT.

54. **Motion for new trial.**—After the verdict has been received and recorded, the defeated party may at once move for a new trial, and such motion will be entered of record. Usually argument upon the motion is reserved to give the parties an opportunity to properly present the ground urged in such motion. In most jurisdictions it is required that a motion for a new trial be in writing, and filed in the cause during the term of court at which the verdict is rendered. Upon the argument of this motion counsel for the defeated party may urge every error which in his judgment was committed against the interest of his client, during the progress of the trial. This usually embraces errors committed in the reception and rejection of evidence, or in the giving or refusing of instructions. If the motion is allowed the cause is generally placed upon the trial calendar to be retried when reached in its order. If it is denied, and the defeated party desires to preserve for review any error that is apparent upon the face of the record, he may then make a motion in arrest of judgment, and except to the ruling of the court in denying such motion.

55. **Arrest of judgment.**—A motion in arrest of judgment can only be urged where the error complained of is apparent upon the face of the record.

The judgment in civil matters will never be arrested because of an error in the mere form of the proceedings, but the error must be in a matter of substance, such as misjoinder of parties, or where the verdict is not responsive to the issues in the case, or where the pleadings of the successful party will not sustain the verdict of the jury, or where the successful party has failed to establish his allegations.

56. **Judgment on the verdict.**—When the court has overruled a motion in arrest of judgment nothing remains to be done except to enter the judgment of record in the cause. Unless there is an express statutory provision the successful party cannot divide his cause of action. He can have but one judgment upon a verdict. In entering a judgment of record no precise words are required to be used, but it is always requisite that the judgment entered shall be definite and certain, both as to the parties and as to the amount. It was formerly required that judgments must be entered at the same term at which verdicts were rendered, but such is not now the practice. A judgment may be rendered at a term subsequent to the verdict and the court may retain jurisdiction of the cause, by a motion to continue from one term to the next, or a judgment may be entered nunc pro tunc as of a previous date. In nearly all jurisdictions where the common law prevails certain general forms are used in the entry of judgments. In some jurisdictions, however, these forms have been greatly abbreviated, the courts there holding, as in Illinois, that the words and phrases contained in a judgment order may be abbreviated

so long as the meaning of the abbreviated order is apparent and intelligible to the lay-reader.

57. **Prayer for appeal.**—When a judgment has been entered, an execution may be issued at once, and levy made upon any property found belonging to the judgment debtor. In order to stay the issuance of such an execution, it is necessary that the defeated party, if he desires to have the judgment reviewed in a court of appeal, shall at once make a motion before the trial judge, for an appeal. In many jurisdictions the right of appeal is unlimited; in some an appeal is granted only in certain kinds of action; in others the right of appeal is governed by the amount of the judgment involved. In some states there are two courts of appeal, one usually known as an appellate court, the other as a supreme court. Usually where two courts of appeal exist the supreme court has jurisdiction to review errors of law only in the cases that pass through the appellate court, but has jurisdiction to pass upon both questions of law and fact, in cases that are appealed directly from the trial, to the supreme court. Generally in common law actions, it is required that where there are two appellate courts an appeal must be taken first to the inferior tribunal and a further appeal is allowed from that court only where the amount involved exceeds a certain sum. In praying an appeal from the judgment of the trial court, it is necessary that it be taken to the first court that has jurisdiction to review the cause. Where the right of appeal is unlimited the trial court immediately grants such motion, upon condition that the party so

appealing shall prepare and file a bill of exceptions in the cause and shall give bond within a fixed time. In many jurisdictions the defeated party has the option to appeal his cause or to seek a review by a writ of error. If he is unable to give the required bond, or for some reason does not desire to give such bond, he will pursue the latter remedy. In such case his adversary may have an execution issued pending such appeal and a levy made upon any property of the debtor that may be found.

58. **Writ of error.**—If instead of appealing from the judgment of the trial court, the defeated party desires to have his cause reviewed by a writ of error he will still be required to prepare and file his bill of exceptions in the same manner as if his cause was to be reviewed by appeal. A writ of error is a new suit and is instituted by the defeated party filing his application for a writ of error with the clerk of the court of appeal. In nearly all jurisdictions such writ is issued by the clerk as a matter of course, and when served upon the successful party below, operates as a notice to him that the cause is pending in the appellate court, and he is required thereafter to take such steps in the matter as he desires. When such writ of error has been sued out of the court of appeal and filed in the trial court, that court is required to prepare a record of the proceedings had therein, including the bill of exceptions, which record, when so prepared and certified, is filed in the court of appeal, and the action then proceeds in such court as a new suit. If, pending the hearing upon the writ of error, it is desired that execution be

stayed upon the judgment below, the judgment debtor may apply to the appellate court, or one of the judges thereof, for a supersedeas to stay such execution.

59. **Supersedeas.**—When it is desired to stay execution upon a judgment pending the hearing upon a writ of error, the judgment debtor must apply to the appellate court or to one of the judges of such court, for an order staying all further proceedings in the court below until the cause has been decided by the court of review. If that court, or the judge who hears the motion, is of the opinion that the questions raised upon the record are of such a character that the court upon a review of the whole cause, might vacate and set aside the judgment, it will usually direct that a supersedeas be issued, the supersedeas being merely an order, directing the trial court to stay further proceedings. A supersedeas is usually allowed upon the condition that a bond be given, requiring the payment of the judgment, or in some instances, the payment of the costs involved, in the event that judgment is affirmed in the court of appeal. In some jurisdictions the denial of a supersedeas operates as an affirmance of the judgment.

CHAPTER IX.

APPEALS.

60. **Who may appeal.**—Under the common law, there was no absolute right of appeal in civil common law actions. The legislatures of the several states have the power to determine what appeals, if any, shall be allowed, and the nature and extent of the jurisdiction of courts of appeal. It is a well established principle that no one will be allowed to appeal, or prosecute a writ of error, unless he is a party to the action below or is afterwards made such by an order of the court, or unless in some way his interest in the outcome of the litigation appears from the record. It follows that a person who is merely a nominal party to an action, and has no interest therein, cannot appeal. It is also essential to a right of appeal, that the party appealing should in some way be aggrieved by the judgment complained of. A party cannot appeal from a judgment in his favor, unless he can show that he has been injured by such judgment. One who is merely a judgment creditor of a party to an action has not, by reason of this fact alone, the right to appeal. If, however, as a creditor he has been made a party to the action he may appeal. The right to appeal may be waived by express stipulation of the parties. In order that such a stipulation shall operate as a waiver of the right to appeal, it must expressly waive

that right. If judgment has been entered by consent of all the parties interested, no appeal may be prosecuted from such judgment. If the judgment has been paid in order to protect the judgment debtor from serious consequences resulting from an execution levy upon his property, such judgment debtor may have a right of appeal. If, however, the judgment has been voluntarily paid, and no legal duress has been practiced, the party so paying it waives his right of appeal.

61. **When appeal must be taken.**—The statutes governing appeals usually fix the time in which a prayer for an appeal must be made. In nearly all instances such appeal must be prayed during the term at which the judgment was entered. A writ of error, however, may be sued out after the expiration of the term, and in many jurisdictions, during any time within five years after the rendering of such judgment. If it is desired to have an appellate court review alleged errors occurring upon the trial of the cause it is necessary, in prosecuting a writ of error, to have the bill of exceptions prepared and filed within the time fixed by the court, usually a certain number of days after the entry of judgment. This time may be extended, but generally a motion for an extensior of time must be made before the original time granted by the court has expired.

62. **Effect of an appeal upon the judgment.**—A prayer for an appeal does not stay further proceedings in the trial court upon the judgment. Appeals are generally allowed on condition that a bond is given within a certain time, conditioned upon the

payment of the judgment, or upon the performance of some other act; and until such bond has been executed, approved and filed, in the cause, the judgment of the trial court remains in full force and effect, and execution may issue thereon. When appellant has executed the required bond and the same has been approved and filed in the cause, all further action upon the judgment is stayed and jurisdiction of the cause is transferred to the court of appeal. During the pendency of such appeal the trial court has no power to enter any further judgment, order or decree in the cause which would affect the rights of the parties. An error, however, in the form of the judgment or in the manner of certifying the record of the trial court may be corrected at any time. If an execution has been issued and a levy made upon the property of the debtor before the appeal bond has been approved, such levy will be released and the execution returned not satisfied.

63. **Effect of issuing writ of error.**—The issuing of a writ of error by a court of appeal does not affect the judgment or stay further proceedings in the trial court. It is merely a direction to that court to send up the record of the proceedings had in the cause, that certain alleged errors may be reviewed. If it is desired that all matters pertaining to the prosecution of the judgment shall remain in statu quo during the pendency of the cause in the court of appeal, plaintiff in error must secure from the appellate court a writ of supersedeas, by giving a bond usually conditioned upon the payment of the judgment to be reviewed. In order to secure a super-

sedeas, courts of appeal generally have provided that the record, or a portion of it, be filed in the appellate court, and that the same be abstracted and presented to them in such form that the alleged errors may be readily perceived. The denial of a writ of supersedeas leaves the judgment of the trial court in full force and effect, and the successful party below may proceed to levy an execution upon any property he may find belonging to the judgment debtor.

64. **Bill of exceptions.**—A bill of exceptions is usually required to contain all the evidence offered or received upon the trial of the cause, including all objections urged by either party and the rulings of the court thereon, all instructions offered by either party, whether given or refused, and the action of the court in regard thereto. In many jurisdictions this bill of exceptions is prepared by an official court stenographer, whose report of the proceedings is generally accepted by court and counsel as being correct. In many other jurisdictions no provision is made for an official court stenographer and the parties to the action are required, if they desire the evidence preserved, to employ their own stenographers, and within a reasonable time allowed by the court, to present a transcript of the evidence, together with the rulings of the court thereupon. Where a difference arises between the parties as to what actually occurred upon the trial of the cause, when no official stenographer was present, the judge is usually left to his recollection, or to such memoranda as he has, to determine what did occur. In some jurisdictions the statutes specifically fix the

time within which a bill of exceptions may be filed. In others that time is fixed by the court at the time judgment is entered. It is always required that the bill of exceptions be filed within the time prescribed or within such further time as the court may have granted.

65. **Preparing and filing record.**—The duty of preparing the record of the trial court rests upon the clerk of that court. In most jurisdictions the statutes prescribe what the record shall contain, and it is necessary that the direction of the statute be specifically followed. It is usually made up of all pleadings filed and all orders entered in the cause, together with the bill of exceptions. When it is prepared and certified by the clerk as being the complete record of the cause, it is filed in the court of appeal, and if, after it has been filed, it is desired to amend the same, a motion to make such amendment must be made in the court of appeal. If either party desires to present to the court of appeal some parts of the record of the trial court not contained in the original record as certified by the clerk, he may move for leave to file a supplemental record.

66. **Assignments of error.**—After the record has been filed the appellant is required to assign upon it such alleged errors as he desires to have reviewed. These assignments are usually made by writing them upon the record itself. All errors assigned and not argued or urged by appellant in his brief thereafter filed, will be waived.

A reviewing court will not consider any question not raised by an assignment of error. In order that

assignments of error may receive consideration by a court of appeal, it is requisite that they be specific. Especially is this true where assignments of error are made concerning the pleadings in the cause. A general assignment, that the court erred in its rulings upon the law, or that the verdict is contrary to the evidence and the law, will not be considered. Appellee may, if he desires, assign cross-errors and thereby raise for review certain questions which he claims were erroneously decided adversely to him.

67. **Abstracts.**—The statutes prescribe the particular methods by which abstracts shall be prepared. It is usually required that an abstract shall contain, in condensed form, the complete record of the cause. It must conform in shape and size to certain prescribed requirements. If in preparing an abstract the appealing party omits or misstates any essential part of the evidence, his opponent has the right to file an additional abstract, covering these questions, and the cost of the preparation and filing of the same will usually be assessed against appellant. The number of abstracts to be filed in the cause is fixed by statute. If the abstracts do not comply with the prescribed regulations they will be stricken from the files and the cause affirmed.

68. **Briefs.**—A brief is a printed document prepared by counsel, and is generally intended to state concisely the questions upon which a ruling of the reviewing court is desired. The brief should contain a clear and concise statement of every question raised by the appeal, and it will generally be stricken from the files if, instead of such concise statement,

it contains a review of all the evidence in the case. It is always permissible in the brief to cite, within reasonable bounds, such authorities as counsel may think applicable to the questions raised. No question, however, can be raised in the brief that was not raised in the trial court. The rules of court generally determine the form and character of the briefs. The time in which briefs are to be filed is determined by the rules. This time may be extended at the discretion of the court. Briefs of the opposing party may be filed within a fixed time, and generally appellant has the right to file a reply after the briefs of his opponent have been filed.

69. **Oral argument.**—Record, briefs and abstracts having been filed, it then remains for counsel upon either side, if he desires to orally argue the cause, to give notice of such desire to the opposing party. The right to argue the cause orally in a court of appeal is generally determined by statute, and the time allotted for such argument is fixed by rules of court. In most jurisdictions the practice prevails that when a cause has been argued by one or both of the parties, the court will take the same under advisement and either before or after the questions raised have been considered by the court as a whole, the cause will be assigned to one of the judges of the court to prepare an opinion and submit it to the court sitting in conference at a later date. If at the conference such opinion meets with the approval of the majority of the court, it becomes the opinion of the whole court, and determines the judgment of the court. If the judgment of the trial court is

affirmed, appellee may at once secure an order of affirmance from the court of appeal, and when filed in the court below, may proceed by execution upon his original judgment. If the order of the court of appeal is to remand the cause for a new trial, then upon the filing of such remanding order, in the trial court, the cause may be again set down for trial upon the calendar.

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LAW OF EQUITY PLEADING

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CHAPTER I.

INTRODUCTION.

A. Fundamentals of Pleading.

1. **Courts.**—Pleading will be much more readily learned if the beginner first understands the nature and function of a court. This may be defined as the agency of the sovereign, established to hear and to determine such controversies as are delegated to that agency for that purpose. Anciently, the sovereign was an individual who, among other duties, assumed to be the "fountain of law and justice." Later, this duty was, by him as sovereign, delegated to subordinates operating under different official names. But it is not to be understood that, historically, this was at all times a conscious and voluntary act upon his part; for the courts, as we now know them, are an evolution, a court of equity having developed historically as sketched in a later section of this article.

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2. **Jurisdiction of a court.**—An agent has no more power than is given to him by his principal, which, in the case of a court in this country, is the state as the sovereign. It therefore follows that a court can hear and determine only such matters as are delegated to it.[1]

This power to hear and to determine certain designated matters is termed the jurisdiction of the court, and the matters thus assigned are those which have arisen between such persons as the sovereign permits to come before this agency.

3. **Equity jurisdiction.**—All of these agencies do not have the same duties to perform, differing in this matter just as do the agents and servants of any principal having a large amount of business which he must delegate to subordinates for action. Hence, there are courts with the duty to hear and to determine different kinds of controversies, involving different kinds of questions. Courts of common law adjudged such controversies as were recognized at common law; courts of equity, those which were not cognizable at common law, but which courts of equity recognized as coming within their jurisdiction. Owing to the historical fact that the common law courts first obtained jurisdiction over a large number of questions and relationships, which might be involved in a controversy, with power to afford relief, and, owing to the further fact, that

[1] Courts are impersonal, and consist of (1) a presiding and adjudging officer styled "the court," while so acting; (2) parties litigating; (3) a jury (sometimes); (4) witnesses; (5) attorneys; and (6) ministerial officers, such as a clerk and a sheriff or marshal. The individual who acts as "the court," when actually presiding, is also styled "the judge."

access to the equity court was granted only when it appeared that there was no adequate remedy offered by the courts of common law, an equity court will not now hear and determine a controversy which properly belongs to a court of common law. The complaining person must go to the proper agency of the state, the common law court, with his grievance. Hence the necessity of understanding the questions, rights, and relationships over which equity courts will take jurisdiction, for if the claim of the complaining party is one that the common law court recognizes and for which it can afford adequate relief, a court of equity has no power to act, that is to say, it has no jurisdiction.

4. **Equity pleading defined.**—Equity pleading is the system of pleading used in the equity courts and is distinct from the systems of common law and code pleading. In this country, it is in use in fourteen different jurisdictions, which are, however, divisible into two classes, namely, those which have separate courts of law and of equity, and those in which both equity and common law cases are tried in the same court under the common law or equity system as required by the nature of the case. To the first class belong the states of Alabama, Delaware, Mississippi, New Jersey, Tennessee and Vermont. The second class includes the District of Columbia, Florida, Illinois, Maine, Massachusetts, Virginia, West Virginia and the United States. In still other states the code system is used, for a proper understanding of which a knowledge of equity pleading is highly desirable, not to say essential.

5. **Origin of equity pleading.**—The system had its origin in the pleading and procedure in use in the chancery courts of England. These courts arose under the duties and powers of the king's chancellor, to whom the king had delegated his power to grant redress in proper cases where the common law courts could give either no remedy, or even if there were one, no adequate remedy under the circumstances of the case.[2] Courts of equity, therefore, were distinct from the courts of common law to which the king had delegated authority to hear and to determine causes which arose under the common law, and equity pleading and procedure were distinct from those which prevailed in the law courts, though the pleading in equity was not uninfluenced by the latter. The early chancellors were often ecclesiastics, and many of them were well acquainted with the canon law in use in the ecclesiastical courts which heard offenses against the church. The canon law in turn was derived from or greatly influenced by the civil law of Rome. Thus it is said that the pleadings in equity were probably borrowed either from the canon law, or from the civil law, or from both.[3] The pleading and practice of the chancery courts of England were transplanted to the colonies of America and became the foundation of the present system in use in the various equity courts of this country.

6. **An equitable cause of action.**—The complaining party, styled variously "complainant," or "plaintiff," varying with the custom of different

[2] Langdell, Equity Pleading (2d ed.), § 37.
[3] Story, Equity Pleading (10th ed.), § 14.

courts, must bring into the court of equity a claim called his "grounds of suit," or by the more common name of "cause of action." If what he brings into court is not such a claim or cause of action as the court of equity can hear and determine, even though some other court, such as a common law court, may do so, then the court of equity will refuse to proceed with it, since the claim is not within its jurisdiction.

7. **Statement of the cause of action.**—In order that the court may see that the claim is one over which it has jurisdiction, a written statement is required, to get the cause before the court. This statement, also called the bill, consists of a certain kind of facts, called the "ultimate" facts,[4] because, if proven to exist, they are the final or ultimate facts from which deductions or "conclusions of law" are made, to enable the court, as an expert in law, to pronounce judgment. Some courts and text writers also term these facts the "pleadable," or "operative" facts.

8. **The issues of fact.**—If it appear from the statement of the ultimate facts that there is a cause of action in favor of the plaintiff, provided those ultimate facts are true, then either the opposite party must admit that those facts do exist, or he must deny the existence of some or of all of them. An issue over the existence of a certain fact, therefore, may be the matter in dispute, and any party wishing to rely upon a fact must assert it in such a way that an issue over its existence can be made. An

[4] New Federal Equity Rules, rule 25.

issue of fact is an issue over the existence of a particular fact or set of facts.

9. **How the facts should be stated.**—The purpose of stating the facts, therefore, is twofold: (1) To reveal a claim which the particular court of equity can hear and determine; (2) to enable the opposite party to deny the existence of the facts, if such party can truthfully do so.

It follows that the facts must be so stated that their existence can be put in issue by the opposite party; that is to say, the plaintiff, when he brings a fact into court for the purpose of aiding in the statement of a cause of action, must either affirm the existence of that fact, so that the opposite party can make an issue over its existence, or he must deny the fact so that the other party can make the issue by affirming its existence.

This requirement has given rise to two requirements of logical pleading: (1) The statements of fact must be positive; and (2) the statements must be certain.

10. **Facts must be stated positively.**—Positiveness of statement, therefore, means that the fact must be stated in affirmative or negative form, so that its existence can be denied, if affirmed, or affirmed, if denied.

The most common instances of the failure thus to state in issuable form are those of recitals, of hypothetical, and of argumentative statements. For example, if the pleader, intending to assert that A "had purchased," should say instead, A "having purchased," he would be merely reciting and not

asserting that A "had purchased," and the fact would not be stated so that the defendant could say that "A had not purchased."

Again, a statement that "if said H had left the said C before he was twenty-one years old, he did so from and upon good cause," does not assert that H "did leave C before he was twenty-one," and therefore it is not in proper form so that the opposite party can deny that "H left C before he was twenty-one."[5]

And again, the words that "the defendant had no notice whatever of any title, claim, or demand of the complainant, or of any other person, to or in the lands so purchased by the defendant, as aforesaid, which would affect the same or any of them, or any part thereof," do not assert positively that the defendant "had no notice," but do assert that he had no notice "which would affect the same." This is argumentative in form and therefore not positive.[6] The pleader should have stated that "the defendant had no notice," and when that was denied, introduced evidence at the hearing on the issue of notice. This evidence would show what kind of notice had been given the defendant, and then it would become a matter of argument whether "the defendant had no notice whatever which would affect the same." The fact of notice in this illustration is not alleged positively but argumentatively.

11. **Facts must be stated with certainty.**—Not only should facts be stated positively but they must

[5] Le Baron v. Shepherd, 21 Mich. 263, 271.
[6] Wood v. Mann, 30 Fed. Cas. 445.

be so stated that it is clear which fact, or facts, are asserted for the purpose of having issue taken upon their existence. In other words, each ultimate fact must be identified so that the other party may know just what fact is brought into court, otherwise there can be no issue of fact. In the law of pleading, the rule is that each fact must be stated with certainty. In the illustration last above, the statement "there was no notice * * * which would affect the same," is uncertain, because the statement does not contain the fact, or facts, which "would affect the same." The court, therefore, held the statement to be uncertain.[7] Uncertainty may arise in a number of ways, but it is not necessary to multiply illustrations. It will be sufficient to say that whenever a fact, or set of facts, is stated so that the fact, or set of facts, is not fairly identified, the opposite party may complain of a lack of certainty.

12. **Strictness in pleading.**—Equity, however, does not require the statement of facts in any set form of words or in any logical order, though the courts prefer an orderly and systematic statement. But if an ultimate fact appear by necessary implication from the other facts stated, the statement will be held sufficient as against an effort of the opposite party to have an entire pleading rejected on that account, although the court might require the fact to be stated specifically were a request made for this only, and not to reject the entire pleading. Thus, when it was charged that "defendants, by adopting the name of The Investor for such paper,

[7] Wood v. Mann, 30 Fed. Cas. 445.

and by printing at the head of its editorial column the words, 'Published by The Investor Publishing Company, Incorporated,' have thereby diverted the trade belonging to the complainant," it was held that this would not cause the rejection of the entire pleading on what is termed a general demurrer, for it does, by necessary implication, assert that the defendant confused the public and thus diverted trade.[8]

13. **What need not be stated.**—The plaintiff, in stating his cause of action, or the defendant, in stating his defenses, hereafter explained, need not set out any matters of which the court is bound to take notice, or of which it is supposed to have full knowledge. These are already in court. It may be said that they automatically are before the court as an accompaniment of any set of ultimate facts with which they can be associated. Hence it is unnecessary for the parties to state (1) matters of law, (2) or legal presumption, (3) or to recite public acts or laws of the jurisdiction within which the court operates, (4) or to allege facts which the particular court is bound to know exist. This does not mean that any particular one of these is actually known to the individual judge who is acting as "the court," but merely that such matters need not be brought into court by pleading them. It will often happen that the individual who is acting as "the court" is actually ignorant of a rule of law, or of the legal presumption accompanying the facts stated, or of the existence of a public statute, or of certain facts

[8] Investor Pub. Co. v. Dobinson, 72 Fed. 603.

which are well known from history or the common experience of men. In these instances, equity procedure, as well as that at common law, permits the attention of the individual "court" to be called to the rule, or presumption, or public statute, or fact, and the matter shown to him. For example, a rule of law applicable to the facts in court is established by showing to the court (i.e., the individual) the opinion of the supreme court of some state in some case. A public statute of the jurisdiction within which the court operates is established by exhibiting the same in a copy of the statutes. But all such matters need not, and, in fact, should not, be stated in the pleading, for they only make the pleading longer and add to the expense.

14. **Impertinence.**—If the statement by which the plaintiff attempts to reveal his cause of action, or the defendant his defense, contain words or expressions which do not assist in the attempt, they are not pertinent and are, therefore, called impertinent, and under the usual practice they may be removed by an application to the court called an "exception." The exception should specifically point out the objectionable words, figures or expressions, and state the reason for the objection. Such words and expressions serve no useful purpose, tend to confuse or mislead, or to lengthen the statement, causing waste of time and money.

In the federal courts, the application is called a "motion to strike out," the "exception" having been abolished.[9]

[9] New Federal Rules, rule 21.

Such an application, however, is addressed to the discretion of the court, since the impertinence may be too trivial or may not tend actually to mislead or confuse; and, therefore, the party who appeals the case on the ground that the court refused or granted the application, must show that he was prejudiced by the ruling.

But it must be remembered that the plaintiff may state facts for various purposes, namely, to obtain discovery or to make interrogatories, and that when these various statements are placed in the first pleading of the plaintiff, called the bill, the words, figures, and expressions useful for one purpose are not impertinent because they are not necessary for the others.[10]

15. **Scandal.**—A statement of facts or expressions, which are unnecessary, and which also reflect upon the reputation or character of another, constitutes scandalous matter, which will be expunged by the court upon his own motion or upon application by the aggrieved person. Technically, all scandalous expressions are also impertinent, but the two are considered separately in equity, because, ordinarily, if the defendant has answered, the first pleading of the plaintiff cannot be referred to an officer of the court, called a master, for examination to ascertain if the expressions be impertinent, but it may be referred for scandal at any time, for such expressions are likely to do harm and make the records of the court the means of perpetuating slander.[11]

[10] Story, Equity Pleading (10th ed.), § 268.
[11] Story, Equity Pleading (10th ed.), § 270.

The application is made by an "exception" specifically pointing out the objectionable statements, and the determination thereof is referred to a master for his report. If the exception is sustained, counsel is held responsible for the contents of his pleading, and he may be ordered to pay the costs of the application to the parties aggrieved. This applies to all the pleadings, and the application may be made by one not a party to the suit, if he be aggrieved.[12]

In the federal courts the application is now made by motion to strike out.[13]

16. **Evidentiary facts not to be pleaded.**—The statement of the cause of action by means of evidentiary facts instead of ultimate facts should not be attempted for two reasons: (1) Because evidentiary facts are of such a nature that even if they were disproved after having been put in issue, the party asserting them might still be entitled to judgment in his favor; (2) because the evidence as it actually occurred makes the statement long, often involved, and confused.

An illustration of the first reason may be borrowed from common law pleading, where the rule is the same. In an action for breach of contract by failure to pay the promised amount for a horse sold and delivered, the plaintiff says: "I said to the defendant, 'Will you buy my horse for one hundred dollars, payable in one week?'" Defendant said, "Yes." If the conversation really were: Defendant said to the plaintiff, "Will you take one hundred dol-

[12] Story, Equity Pleading (10th ed.), § 47.
[13] New Federal Equity Rules, rule 21.

lars for your horse?" to which plaintiff replied, "Yes," the defendant, when sued on the statement as made by the plaintiff, could truthfully deny that conversation, thus putting the very words used in issue, and then prove the conversation as it actually did occur, showing that defendant made the offer and that plaintiff accepted, instead of the contrary. Upon the issue thus made over the existence of the evidentiary facts, the defendant would prevail, and yet both simply go to prove an offer and acceptance as a matter of law. If the plaintiff should make the statement thus: "The plaintiff sold and delivered to the defendant a horse at the agreed price of one hundred dollars," each conversation might be given in evidence by the two parties, and the plaintiff recover judgment. Hence the rule that the cause of action should be stated by means of the ultimate and not the evidentiary facts.

However, if the statement of the cause of action should contain evidentiary facts along with the necessary ultimate facts, the entire statement will not be rejected as bad, but it will be subject to attack to have the evidence stricken out of the statement as unnecessary.

But evidence will be permitted in the charging part of the bill in addition to the statement of the cause of action, as will be explained hereafter.

17. **Conclusions of law not to be stated.**—Conclusions of law are the inferences or rules of law to be deduced from the ultimate facts stated. Since one of the objects of stating a cause of action is to notify the opposite party of the claim to be proven against

him at the trial, conclusions of law are not to be used. They are too general, covering too many situations of fact, to be sufficient to notify the opposite party and the court of the particular claim which has been brought into court for determination.

But, on the general objection that it does not state a cause of action, a statement will not be rejected merely because it contains conclusions of law, if the ultimate facts to show a cause of action are included within the statement. However, an application to strike the conclusions out of the statement will be allowed, if it appear to the court that they really do confuse. Even if they do not, the court may nevertheless allow the application, since the words are unnecessary and tend to encourage loose and careless statements; but the court is not obliged to sustain the application.

Conclusions of law are sometimes necessary or useful to identify the cause of action intended by the facts stated, for it may be that the very same facts will state either of two causes of action. In such a case, the conclusions of law are always permissible.

18. **Discovery.**—At the very beginning of their history, courts of equity "probed the conscience" of the parties, and their jurisdiction was exercised to elicit a discovery of those evidentiary facts "affecting the merits of the equity case, which might be in the knowledge of one or other of the parties or of both, and to compel the discovery and production of deeds and documents in their possession."[14] The

[14] 1 Spence, 677.

party, however, was not permitted to require evidentiary facts from his adversary, except in support of the ultimate facts stated by him for the purpose of revealing his own cause of action. Such discovery was incidental to the relief sought.

At a later time, because the common law courts would not permit either of the parties to the action at law to testify, with the result that there was often a failure of justice, because crafty men would have possession of documents which would be the only evidence available to prove a cause of action or a defense in the common law action in favor of their adversary parties, the equity courts allowed the party to file a proceeding in equity to obtain discovery of the facts or of the documents in support of his own cause.[15] In this proceeding, discovery was not incidental but was the sole object of the proceeding. After discovery, the parties proceeded with the other action.

At the present time, proceedings solely for discovery are rarely used, since the adversary may be placed upon the stand or his deposition taken in proceedings at law or in equity.

In a proceeding brought solely for discovery, it may be said that discovery is the cause of action and that it is stated by the facts showing the right to discovery; when discovery is incidental, it depends upon the cause of action stated for relief and must pertain to such cause of action.

19. **How discovery is stated.**—It will be remembered that the statement of the cause of action

[15] Gibson, Suit in Chancery (Rev. ed.), p. 1116.

should not include evidentiary facts, but this is not true of the statement of the facts which the adversary party is asked to divulge. In a proceeding in which discovery is sought as incidental to the cause of action stated, the very facts sought as incidental discovery consist of "evidentiary facts," and it is therefore proper that discovery should be stated largely by means of such facts, in contrast to the rule applying to the statement of the cause of action by the ultimate facts.

20. **Construction of pleadings.**—In suits between sovereign states it is the duty of the court to mould the rules of pleading and practice in such manner as to bring the case to final hearing, and in ordinary cases between individuals the courts of equity have always exercised an equitable discretion in relation to the rules of pleading, whenever it has been found necessary to do so in order to accomplish the purpose of justice.[16]

But while the rules of pleading are less strict in equity than at law, regard is had to the great objects of pleading, so that injustice cannot be done by means of loose methods. The defendant, for instance, cannot plead so loosely as to avoid giving real discovery or evade the right of plaintiff to search his conscience.[17]

The character of a pleading is determined by the statements it contains, and not by the name given or endorsed upon it.[18]

[16] Rhode Island v. Massachusetts, 14 Pet. 210 (U. S.).

[17] Hardman v. Ellames, 5 M. & K. 732 (Eng.).

[18] Northman v. Liverpool, etc., Ins. Co., 1 Tenn. Chan. 312; Arnold v. Moyers, 1 Lea 308 (Tenn.).

B. Parties.

21. **Parties—In general.**—It is obvious that all persons should be permitted to sue or be sued in a court of justice, except those who are disqualified because of some rule of law, or because they are incapable of caring for their own interests by reason of natural incapacity. Of the former class are aliens under certain circumstances, alien enemies, and married women in jurisdictions where the common law rule as to their incapacity has not been changed by statute. Of the latter class are infants, lunatics, and idiots.

22. **Aliens.**—Aliens, ordinarily, may sue, and of course, may be sued in a court of equity. However, though an alien friend is under no personal disability to sue, yet the subject matter of the suit may be such as may prevent the court from hearing it. Thus, under the laws of some states, an alien cannot hold land, and, accordingly, an alien friend cannot bring an action by which he may take land, or enforce specific performance of a contract to convey land to him, for this would be to allow him to do indirectly what he could not do directly, namely, take and hold land.

23. **Same subject—Alien enemy.**—Generally, an alien enemy will not be permitted to sue, since he will thus be asking the court to assist him with a judgment when he, theoretically at least, is a subject of a power inimical to the state or sovereign which established and maintains the court. But when an alien enemy is permitted to be sued, it is

said that he should be permitted to make a defense, and even to file a bill of discovery in aid of the defense.[19]

24. **Married women.**—Except where the rule is altered by statute, a married woman must sue and be sued with her husband as at common law, which holds that her identity is merged into that of her husband. There are, however, three exceptions to the rule: (1) Where she claims rights in opposition to those of her husband, in which case she sues by her "next friend," who is someone else than her husband; (2) where her husband sues her to establish some right recognized in equity, in which case she is represented by a guardian ad litem (for the suit); (3) in suits with respect to her separate property, where she sues by next friend or is sued and is represented as above. Her husband, however, in this case, may be the guardian.[20]

25. **Idiots and lunatics.**—Idiots and lunatics may sue at law by their next friend but in equity they must sue in the name of the committee or guardian of their estates, duly appointed, unless there be a partial natural disability, as in case of one deaf and dumb. In the latter case, the court will appoint someone to join with him as next friend.[21]

But the rule that suit can be brought only by committee or guardian of the lunatic is relaxed where it may be necessary to preserve the estate of the supposed lunatic pending an inquiry, called an

[19] Story, Equity Pleading (10th ed.), § 53, note 4.
[20] Story, Equity Pleading (10th ed.), §§ 61-63.
[21] Dorsheimer v. Roorback, 18 N. J. Eq. 438.

inquisition, to secure the appointment of the committee or guardian.[22]

26. **Infants as plaintiffs.**—An infant cannot bring suit by himself for the reason that the law, out of regard for his interests, presumes that he lacks discretion, and for the further reason that he cannot be held liable for costs. Suit, therefore, is brought in his name by some authorized person styled in the pleading as his "next friend."[23] This person is treated as an officer of the court and is responsible for the costs of the suit. But a mere volunteer cannot sue for the infant.[24] He must be the person who is the general guardian of the infant, or the infant's nearest relative, or, failing these, someone whom the court determines to be one who will care for the infant's interests. If it be charged in the suit that the person acting as the next friend is not proceeding for the infant's best interests, or that the suit is not to the best interest of the infant, the court will inquire and direct proceedings accordingly. The title of the suit is in the name of the infant "by ———— as his next friend."

27. **Infants as defendants.**—Suits against infants are brought against them personally, but after the institution of the suit the court appoints some suitable person, styled the "guardian ad litem," to represent the infant's interests, unless, under the law of the particular state, a guardian of his estate has been appointed by the probate or other court.[25]

[22] Roughan v. Morris, 87 Ill. App. 642.
[23] Story, Equity Pleading (10th ed.), § 57.
[24] Jarvis v. Crozier, 98 Fed. 753.
[25] Colt v. Colt, 111 U. S. 556, 28 L. Ed. 520.

The guardian is never appointed on the nomination of the adverse party, because it would be improper to permit the latter to name the person who is to resist his claim against the infant.[26] If there is no general guardian, it devolves upon the plaintiff to suggest to the court the infancy of the defendant, and he should not proceed with the case until this appointment is made.[27] The father is usually the proper person for the guardian ad litem, but not always, as a court of equity regards itself as peculiarly bound to see that the interests of the infant are properly represented and will, therefore, see that a suitable person is appointed.[28] But a federal court has held that a father, who files an answer without having been appointed by a court, binds the infant. On the other hand, a judgment has been reversed under similar circumstances, it being stated that the plaintiff should have ascertained the infancy in the first instance and not after the trial was over.[29] This seems to be the rule. Nor can a judgment by default, that is, a judgment or decree when the defendant infant fails to plead, nor a judgment pro confesso be taken against him.[30]

28. **Joinder in general.**—It is a rule in courts of equity generally, that all persons interested in a suit, or to be affected by the results, should be made parties,[31] because equity avoids a multiplicity of suits

[26] Knickerbacker v. De Freest, 2 Paige 304 (N. Y.).
[27] Swan v. Horton, 14 Gray 179 (Mass.).
[28] Bank of the U. S. v. Ritchie, 8 Pet. 128, 144 (U. S.).
[29] Johnson v. Waterhouse, 152 Mass. 585.
[30] Enos v. Capps, 12 Ill. 255.
[31] Simkins, Federal Suit in Equity (2d ed.), p. 223.

if possible, and the rights of no one should be determined without an opportunity to prosecute or defend. This rule will, however, not be permitted to do injustice or to impose unnecessary burdens. It is therefore relaxed where either of these will result. Hence, no uniform test can be adopted, the determination of the joinder of an absent person depending upon whether his rights are substantially concerned in the pending cause.

29. **Classes of parties.**—Under the usual equity practice, parties are divided into two classes, proper and necessary. The first class relates to those who may properly be joined in the suit, and the second to those who must be joined. If the merits of a cause can be determined without prejudice to the rights of an absent person, or if the circumstances make the application of the rule wholly impracticable, the court will proceed without him. But if the rights of the parties to the cause cannot be established without making other persons parties also, or if the rights of other persons will be prejudiced by the decree, the court will not proceed, even though such persons cannot be reached by process so as to be brought into court.

In the federal courts there are three classes of parties, formal, necessary and indispensable. Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject matter of the suit, which may conveniently be settled and further litigation prevented. They may or may not be parties at the option of the plaintiff. Necessary parties are

those who have an interest in the controversy but whose interests are separable from those of the persons before the court and who will not be directly affected by a decree which does complete justice between such other persons. They should be made parties in order to end the litigation. But if their interests can be protected so that the decree does not pass upon their interests, they may be omitted when they cannot be gotten into court because outside of its territorial jurisdiction, or when their presence would prevent the federal court from taking jurisdiction of the case. Indispensable parties are those who not only have an interest in the subject matter of the suit, but whose interests are such that a final decree cannot be made without affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[32]

30. **Exceptions to rule.**—The general rule that all persons who are interested in the object of the suit should be made parties is subject to several exceptions, as follows:

When it is utterly impracticable to make the absent persons parties, because (a) they are out of the jurisdiction and cannot be reached by a process of the court ordering them to appear; (b) when they are very numerous and they could not be joined without great delay and inconvenience and their interests are really represented by parties present. Where a bill in equity for an account was brought by one partner against another in a partnership con-

[32] Shields v. Barrow, 17 How. 130, 139 (U. S.).

sisting of four members and the bill stated that the other two were out of the jurisdiction and that they had received their full share of the partnership goods, and that the defendant had received much more than his share and the plaintiff much less, it was held that the absent partners need not be joined in the suit.[33] On the other hand, if the suit had been for a dissolution of the partnership, the absent partners would have been necessary for the reason that their interest in the object of the suit was substantial.[34] The rule as to dispensability ordinarily is that if the persons out of the jurisdiction are merely passive objects of the judgment of the court, or if their rights are merely incidental, then they may be dispensed with as parties.[35]

[33] Towle v. Pierce, 12 Metc. 329 (Mass.).
[34] Fuller v. Benjamin, 23 Me. 255.
[35] Story, Equity Pleading (10th ed.), § 81.

CHAPTER II.

THE PLEADINGS.

A. Of the Plaintiff.

1. The Bill.

31. **Definition.**—The plaintiff brings his claim before the court by means of his first pleading called the bill. When the state was a party, its first pleading was formerly called the information, and this name is still preserved in some jurisdictions. Informations, however, differ from bills little more than in name and form, and the same rules are, in general, applicable to both.

When the suit immediately concerns the rights of the state, information is filed in court in the name of the state "on the relation of the Attorney General," but when the proceeding does not directly concern the sovereign, the name of the private party is inserted in the information, and he is termed the relator. If, in connection with the state, he have an interest in the cause of action, then his personal claim is joined with that of the former, and the pleading is called an information and bill.[86]

32. **Of what the plaintiff's claim must consist.**—From what has been stated, it is clear that the plaintiff's claim must consist of a cause of action, though it may also include discovery. Therefore,

[86] Story, Equity Pleading (10th ed.), § 8.

the bill must contain the statement of the ultimate facts which reveal a cause of action in the plaintiff as against the defendant.[37] Discovery may be sought as incidental to the cause of action, or it may be that the bill is brought for discovery alone. In the latter case, it may fairly be said that the cause of action consists of the statement of the grounds which entitle the party to the discovery and that, therefore, the statement of the discovery is also the statement of the cause of action, for, as has been explained, equity will give discovery in aid of another cause of action brought in another court or in the same court in another suit. But in a general sense the statement of the grounds for discovery in a bill of discovery, as it is called, amounts to the statement of a cause of action.

But a bill brought substantially for relief and asking also for discovery cannot be maintained for discovery if it cannot be maintained for relief, for in such case the discovery is sought in aid of the claim for relief; and if this claim does not entitle the party to the relief sought, discovery will be in vain, and the time and effort spent to get the discovery would have been spent for naught.[38]

But bills of discovery are little used at the present time because the desired information may now be obtained by making the party a witness or by interrogatories.

33. **Formal parts of the bill.**—Anciently, the bill consisted of nine formal parts, namely, (1) the ad-

[37] Chase v. Palmer, 25 Me. 341.

[38] Emery v. Bidwell, 140 Mass. 271; McClanahan v. Davis, 8 How. 170 (U. S.); Venner v. Atchison, etc., R. Co., 28 Fed. 581.

dress; (2) the introduction; (3) the stating part or premises; (4) the confederating part; (5) the charging part; (6) the jurisdictional clause; (7) the interrogating part; (8) prayer for relief; and (9) prayer for process. Of these, only five were commonly used, to wit, the stating and charging parts, the interrogatories, the prayer for relief, and the prayer for process. But all of these may be dispensed with excepting the stating part and the prayer for relief.[39]

Under the federal practice it is sufficient for the bill to contain, in addition to the usual caption:[40]

First, the full names, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties, as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If

[39] Comstock v. Herron, 45 Fed. 660.

[40] The caption consists of the title of the court and the names of the parties.

special relief pending the suit be desired, the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.[41]

For convenience of treatment, these parts will be examined in the order of their importance.

34. **Practice parts of the bill.**—The bill also has certain parts that are required by the practice, namely, the signature and the verification.

35. **Stating part of the bill.**—The formal part of the bill containing the statement of the cause of action is called the stating part, or premises, and the old pleaders expressed the same with considerable formality. It should not be intermingled with other parts of the bill, for this might lead to confusion and to the fault of uncertainty and lack of positiveness, but, on the other hand, if the ultimate facts are specifically stated, there is no rule of law which requires that those facts should be alleged in a formal stating part of the bill.[42]

Logically, however, the statement of the cause of action will be most clearly given separately from the other parts of the bill.

The bill must state every fact necessary to show a cause of action in favor of the plaintiff,[43] and also the performance of every equitable act required of him under the circumstances as a condition precedent to access into a court of equity to ask that equity be done, such as a tender of payment of an

[41] New Federal Equity Rules, rule 25.
[42] Story, Equity Pleading (10th ed.), § 32.
[43] Perry v. Carr, 41 N. H. 371.

amount admitted to be legally due in a suit to restrain the collection of an amount in excess thereof.[44] If the facts stated in the bill are overcome by proof, the plaintiff cannot have a decree merely because it appears that issues might have been made by pleading still other facts upon which he would have been entitled to relief.[45] He must bring into court by his pleading every fact necessary to state his cause of action and to show his right to ask the aid of the court at that time, both for the purpose of getting his claim before the court and being allowed to prove the fact.

36. **Charging part of the bill.**—The discovery sought is often stated or based upon the charging part of the bill, which is used for two purposes:

(1) To anticipate the defenses which the plaintiff charges that the defendant claims and either to deny the existence of the facts by which these defenses are stated or to confess and avoid the effect of the defense which the plaintiff charges as claimed by the defendant. For example: The plaintiff charges "that the defendant will claim that the plaintiff by his certain writing released defendant from all claims; but plaintiff, that said writing was obtained by the false statements of the said defendant that * * *", followed by a statement of facts to show that the writing was obtained by deceit on the part of the defendant. The statement of the claim of the defendant and the plaintiff's counter-attack thereon is necessary because the bill is the only pleading

[44] Johnson v. Roberts, 102 Ill. 655.
[45] Dorn v. Geuder, 171 Ill. 362.

by which the plaintiff can bring facts into court. His other pleading, the replication, is limited to other purposes. Formerly this was not the case, the pleadings in equity following the analogy of the common law pleadings, by which the parties could alternately plead their several defenses against the adversary's pleading of facts. Should the plaintiff omit the anticipated defense of the defendant he may be allowed to amend so as to meet it by stating new facts that confess and that avoid, but it is more convenient to charge the defense in the first place and meet it then.

In the federal courts, although the recent changes made by the new rules omit any reference to anticipated defenses, it is obvious that these may still be charged and met as before.[46]

(2) To charge some evidentiary facts which the plaintiff desires the defendant to discover or to explain as proving the existence of the ultimate facts contained in the stating part of the bill. The reasons for this and the extent to which evidence may be obtained from defendant have already been explained.

If the bill is sworn to, it is perjury for the plaintiff knowingly to make a false charge in this part of the bill.[47]

37. **Interrogatory part of the bill.**—Though formerly highly useful and almost universal in practice the interrogatory part is at the present time but little used, owing, no doubt, to the possibility of

[46] Hopkins, Federal Equity Rules, 158.
[47] Smith v. Clark, 4 Paige 368 (N. Y.).

getting evidence from the defendant by deposition or by making him a witness at the hearing or trial. The interrogatory may be general, asking that the defendant answer the contents of the bill, or it may be special, consisting of specific inquiries, which the defendant is required to answer, provided the questions are justified by the facts contained in the stating and charging parts of the bill.[48] These interrogatories are addressed to the defendant and not to third persons. The latter are examined orally as witnesses in the cause.

38. **The address.**—In early times, redress for wrongs not remediable at law was obtained from the king, and the petitions, or applications, were made to him; in later times, to his chancellor. Consequently the bill, in its final form, contained a formal address to the person or persons who had the actual custody of the Great Seal under which the writ permitting suit could issue.[49] In the United States the address of the bill is to the court from which the relief is sought and contains its technical and appropriate description. Consequently the address must be varied accordingly. Thus, in Massachusetts and Maine the bill is addressed "To the Honorable the Justices of the Supreme Judicial Court." In the District Courts of the United States the address is, "To the Judges of the District Court of the United States for the District of ————, ———— Division."

The address is required in all bills.

[48] Story, Equity Pleading (10th ed.), § 36.
[49] Daniel, Chancery, *357.

39. **Introduction.**—The introduction contains the full names of the plaintiffs, the character in which they sue, their residences, and, in the federal courts, their citizenship. The object of such a statement is to enable the court and the other parties to know where and to whom they are to resort to compel obedience to any order or process, such as for the payment of costs or to punish for improper conduct, as well as to identify the subject matter of the suit and the parties in case of future litigation.[50]

This part also usually contains the names and addresses of defendant, although these are often found in the stating part. But the federal courts require these to be stated in the introduction.[51]

40. **Confederating part of the bill.**—A confederating clause alleged a combination between the defendants and others to injure and oppress plaintiffs. It is of little use in practice, being treated as impertinent, and need not be denied or responded to in the answer. It was inserted in the bill under the mistaken belief that without it the names of additional persons with whom the conspiracy was charged, but whose names were alleged to be unknown, could not be added by amendment. Since specific allegations of the ultimate facts are required to state fraud, the confederating clause is a mere conclusion of law, and may well be omitted from the bill.

41. **Jurisdiction part of the bill.**—This part was a formal clause consisting of the general statement

[50] Story, Equity Pleading (10th ed.), § 26.
[51] New Federal Equity Rules, rule 25.

that the "plaintiff is remediless * * * according to the strict rules of the common law, and can only have relief in a court of equity." This is wholly unnecessary, for the jurisdiction of the court depends upon whether the bill states a cause of action and not upon such a formal statement, which is, after all, only a mere conclusion of law. It is now generally omitted.

42. **Prayer for relief.**—In equity the kind of relief desired must be prayed for and the prayer varies according to the ultimate facts of the various bills. They are, however, divided into two classes, general and special. The latter designates the particular relief to which the plaintiff thinks himself entitled, but which must follow as a matter of law from the case stated in the stating part of the bill, for the plaintiff is entitled only to that relief which is the legal result of the facts stated. The prayer for general relief is "for such other and further relief as may be just and equitable," and can never be properly and safely omitted, for if the plaintiff should mistake the relief which he prays in the special prayer the court may give him that relief to which he is entitled by the general prayer based upon the ultimate facts stated in the bill.[52]

In case of bills for charities and of bills on behalf of infants, relief will be granted upon the facts of the case though not particularly requested in the prayer.[53] This is so because of the peculiar regard which equity has for charities and persons under

[52] Story, Equity Pleading (10th ed.), § 40.
[53] Story, Equity Pleading (10th ed.), § 40, note 5.

natural disability. In the federal courts only special relief need be prayed, which may be stated and sought in alternative forms,[54] for when the plaintiff is in doubt as to whether he is entitled to one kind of relief or another he may pray in the alternative, provided the facts upon which the relief is prayed are not inconsistent.[55] Where the plaintiff desires to restrain the defendant by an injunction this must be expressly prayed, because the defendant might, by his answer, make a different case under the general prayer from what he would if the injunction were specially prayed. The relief granted must always be consistent with the manifest purposes of the bill as shown by the ultimate facts pleaded.[56]

While it may be said that in a general sense all bills are for relief, there are certain bills which are not classed as such, and if these bills contain a prayer for relief they will, in England though not in this country, be open to objection as a whole.[57] In this country only the prayer for relief will be open to attack by demurrer,[58] a pleading devoted to raising objections that appear upon the face of the bill.

43. **Prayer for process.**—Under the general practice the bill must contain a prayer for the issuance of the process of the court, called a subpœna, by which the defendant is commanded to come into court to plead to the bill. This is necessary be-

[54] New Federal Equity Rules, rule 25.
[55] Cella v. Brown, 144 Fed. 742.
[56] 1 Daniel's Chancery, 378, note a.
[57] Story, Equity Pleading (10th ed.), §§ 17, 312.
[58] Same, 312.

cause the defendant is brought in only after the court has scanned the bill to see if it states a cause of action. Process does not issue as a matter of course but only when the court has been requested to cause the defendant to be brought in personally to have his conscience searched.

The prayer must name the defendants specifically[59] and must designate the capacity in which they are sued,[60] such as executor or guardian if they are sued as such, and none are parties against whom process is not prayed.[61]

Informal defects in the prayer for process may be aided by the other parts of the bill.[62]

Objections to it for its defects are made by demurrer in the state practice,[63] but these are waived if the defendant comes in and files a plea or answer to the merits.[64]

This prayer is, however, no longer necessary in the federal courts, having been omitted as one of the parts of the bill.[65]

44. **Practice parts of the bill.**—In addition to the formal parts of the bill heretofore stated the following are required: 1. the signature; 2. the verification.

Signature. Every bill must be signed by counsel and, in addition, in some instances by the plaintiff. Since the bill is drawn by counsel he should be re-

[59] Carter v. Ingraham, 43 Ala. 78.
[60] Same.
[61] Howe v. Robins, 36 N. J. Eq. 19.
[62] Evans v. Evans, 23 N. J. Eq. 71.
[63] Palmer v. Stevens, 100 Mass. 461.
[64] Sage v. Thomas, 3 Blatch. 11 (U. S.).
[65] New Federal Equity Rules, rule 25.

sponsible for its contents. If it contains matter criminal, impertinent, or scandalous, such matter may be expunged and the counsel ordered to pay costs.

In the federal court the bill or other pleading must be signed individually and not in the firm name, if there be more than one counsel,[66] and such signature is considered as a certificate of each individual that he has read the pleading; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is contained therein, and that the pleading is not interposed for delay. This implied certificate applies to all pleadings signed by counsel.

The signature should follow immediately after the close of the formal parts of the bill, but signature on the back of the bill has been held sufficient.[67]

The party plaintiff may also sign the bill himself.

Verification. Verification is supporting the pleading by written oath made before an officer having authority to administer the same and is placed immediately following the signature. It is not a matter of form, but where required by rule of court or by statute, it must be done in order that the bill may be good. As a general rule a verification should be made whenever the bill seeks some immediate order or interposition of the court, such as an injunction, an attachment, or a ne exeat,[68] which is a writ commanding the person against whom it is issued

[66] New Federal Equity Rules, rule 24.
[67] Dwight v. Humphreys, 3 McLean 104 (U. S.).
[68] Gibson, Suits in Chancery (Rev. ed.), p. 161.

not to go out of the territorial jurisdiction of the court.

It is much better practice for the party and not the counsel to swear to the pleading and in instances where the facts must be sworn to positively and not upon mere information the oath must be made by the person having actual knowledge thereof.

In the federal court when special relief is prayed for, the bill must be verified by the plaintiff or by someone having knowledge.[69]

45. **Joinder of causes of action.**—For the sake of the convenient administration of justice, equity desires to avoid a multiplicity of suits and permits the joinder of two or more causes of action in the same bill, provided this joinder does not itself cause an inconvenience to the court or a substantial injury to the rights of the defendant.

No general test of proper joinder can be laid down. That depends upon the circumstances of the particular case and much must be left to the sound discretion of the court.[70]

46. **Multifariousness.**—Multifariousness consists in the improper joinder of different causes of action or of different parties in the same suit.

The union of several causes of action of a distinct and independent nature, or of defendants who are not interested in all of the causes of action stated, is forbidden, because the defendant or defendants, by the joinder, would be compelled to plead to different matters wholly unconnected with

[69] New Federal Equity Rules, rule 25.
[70] Oliver v. Piatt, 3 How. 333 (U. S.).

each other, so that proofs applicable to each would be apt to be confused with each other, and great delay be thus occasioned to some causes of action at issue because the others were not ready.

47. **Bill with double aspect.**—While the bill should notify the defendant clearly and definitely of the particular cause of action brought, it is sometimes necessary, from the particular circumstances of the case, that it be brought with a double aspect; thus, if it be desired to set aside a deed on the ground of fraud and undue influence, the bill may charge insanity of the party making the deed and it may also charge great weakness and imbecility of mind of the maker. The case is founded upon fraud and undue influence which might be exercised when the maker was either insane or very weak in mind.[71] The two aspects, or alternatives, must, however, be the foundation for precisely the same relief and be consistent with the case made,[72] and care also must be taken that the bill be unambiguous.

2. The Replication.

48. **Definition.**—Under the present practice the new facts stated in the defendant's plea, or answer, are placed in issue by a formal denial contained in a pleading called the replication.

In the federal court, however, unless the answer assert a claim of the defendant against the plaintiff, a reply, as it is called in that court, is unnecessary

[71] Story, Equity Pleading (10th ed.), § 254; Simkins, Federal Suit in Equity (2d ed.), p. 284.

[72] Simkins, Federal Suit in Equity (2d ed.), p. 284.

unless required by special order of the court or judge, and any new or affirmative matter in the answer is deemed to be denied by the plaintiff, so that the cause is generally at issue upon the filing of the answer.[73]

B. Of the Defendant.

49. **In general—Defendant's pleadings.**—The defendant's pleadings are the demurrer, plea, and answer, to which may be added a fourth, called an exception, though this is not strictly a pleading.

Under the federal practice, demurrers, pleas, and exceptions are abolished,[74] but the defenses and objections still exist. Failure of the bill to state a cause of action heretofore raised by demurrer is now raised by motion to dismiss or by answer.[75] Defenses are now asserted in the latter,[76] and objections to the bill for scandal or impertinence are made by motion to strike out,[77] while indefiniteness and uncertainty are raised by a motion for a further and better statement or for further and better particulars.[78]

Since a bill may contain several distinct claims, such as a cause of action, grounds for discovery, and interrogatories, the several defenses adopted by the defendant should distinctly state whether each is to the whole or part of the bill, and, if to a part, which part.[79]

[73] New Federal Equity Rules, rule 31.
[74] New Federal Equity Rules, rule 29.
[75] Same.
[76] Same.
[77] Same, rule 21.
[78] Same, rule 20.
[79] Story, Equity Pleading (10th ed.), § 695.

The defendant should not demur and plead, or demur and answer, or plead and answer to the same part of the bill, for by so doing the later pleading overrules the former. This is so because the demurrer is filed in order not to plead or answer, and the same reason applies to the plea as preceding the answer.

1. The Demurrer.

50. **Definition.**—The demurrer is the pleading by which the defendant objects to the bill for certain deficiencies in form or for the want of equity. It virtually says to the court, "Stop! I ask the judgment of the court whether I am compelled to plead to this bill. I say I should not for the reason that it is defective in the following respect," following this by pointing out the alleged defect. It does not say this in the above language, but such is the real meaning of the formula used when the defendant says that he "demurs" for the reason stated.

As noted above, the motion is substituted for the demurrer as the means by which the objection is raised in the federal courts.

51. **The defense made.**—The demurrer attacks the bill for defects apparent upon the face of the bill. It raises a question of law and not a question of fact, for the demurrer is not used to bring facts into court. If it attempts to do so, or to raise a question of law which needs to have additional facts brought in, it is called a "speaking demurrer" and will be overruled. Facts are brought into court by other pleadings of the defendant.

If the defects are such that they cannot be remedied by an amendment of the bill, the demurrer ends the suit; if the defects can be remedied, then the demurrer only delays proceedings. If the defects are merely in the form of the bill, omitting to demur will waive the objection, but if the defect be such as goes to the jurisdiction of the court, such as the omission of the citizenship of the parties in the federal court, it cannot be waived. If the defendant's demurrer is overruled by the court he can either "stand on" it, or, as it is called in equity, "abide by" it, allow decree to be entered against him, and then raise the question upon an appeal to the higher court.

52. **Kinds of demurrers.**—There are three kinds of demurrers, general, special, and demurrers ore tenus (by word of mouth). The first two are distinguished from the third by being in writing.

A bill must bring into court a subject matter about which the court has the power to entertain controversies; it must also state all the ultimate facts sufficient to show an equitable cause of action. If it fail to do either, the defendant may demur generally "for want of equity in the bill" without specifying more particularly the objection. But if he objects for other defects apparent upon the face of the bill, he must point them out specially, such as failure to join certain persons when the statement of the cause of action shows that they are necessary to the determination of the controversy. A demurrer for nonjoinder or misjoinder of parties, or for misjoinder of causes of action (multifarious-

ness) must point out the defect and state wherein the bill is faulty.

53. **Ore tenus.**—An oral demurrer may be made at the hearing of the argument of a written demurrer, but it must be to the same part of the bill as is the written demurrer. Even if the grounds of the written demurrer are held not to be good on the argument, the demurrer ore tenus may be sustained because it does state a sufficient objection to the bill.

54. **Grounds of demurrer.**—The grounds of a demurrer to a bill for relief may be any one or more of the following: (1) That the bill shows on its face that the court has no jurisdiction over the subject matter of the suit or over the parties; (2) That it shows that there is (a) a nonjoinder, or (b) a misjoinder of persons as parties, or (c) that there is a lack of capacity to sue; (3) That the bill is defective in its frame, such as the omission of a necessary part or a defective statement thereof, or that it is bad in form for multifariousness of causes of action; (4) That the remedy will not lie, or that the suit is barred, because of the Statute of Limitations, the Statute of Frauds, or of laches in bringing suit, and the like; (5) That the bill does not state a case that can be heard and determined in this court.

The grounds of demurrer to a bill of discovery are, that the bill shows a question or circumstances that will subject the defendant to criminal prosecution, to a forfeiture, or a penalty, or to the revelation of a communication privileged in law, such as between husband and wife, or lawyer and client.

55. **Effect on the facts.**—The demurrer admits the existence of the facts well pleaded in the bill. It does this for the sake of raising the question of law, and if the demurrer is overruled and the defendant does not "abide by" his demurrer, he may impliedly withdraw his admission by making his next pleading to the bill or to the same part of the bill. The demurrer does not admit the existence of any statement other than facts, and of these, only those which are pertinent to the bill.

2. The Plea.

56. **Definition.**—A plea is a pleading used by the defendant either to deny the existence of a fact or set of facts stated in the bill, or to state new facts which reveal a proposition of law that will avoid the necessity of making an answer,[80] or, under certain circumstances, both to assert new facts and to deny other facts pleaded in the plaintiff's bill.[81] It is, therefore, the defendant's first pleading that deals with the existence of facts.

57. **Purpose of plea.**—The purpose of this pleading is twofold:

(1) To enable the defendant to avoid giving discovery of those facts which the plaintiff otherwise might have by the aid of a court of equity; (2) To avoid the delay and expense incident to the answer, which is the pleading devoted primarily to meeting the merits of the bill or to giving the discovery sought. These two are advantages to which may

[80] Farley v. Kittson, 120 U. S. 303.

[81] Langdell, Equity Pleading (2d ed.), § 101.

be added that of confining the admission of fact to the purposes of the particular suit, while those of an answer are actual and binding upon the defendant for all purposes.[82]

58. **Plea must be single.**—Such being its purpose, the plea must not raise more than one single point which, in effect, will avoid giving answer to the bill or that part of the bill to which the plea has been directed. It is, therefore, the rule that a plea must raise but a single point of law;[83] thus, the plea of title derived from the person under whom the plaintiff claims may consist of a variety of facts, but the title is only a single point, and if plaintiff, in turn, denies the existence of these facts there is but one point of law to be determined.

59. **Multifarious pleas.**—Therefore, if a plea contains two or more points as reasons why the defendant should not answer the bill or part of the bill which the defendant desires to avoid answering, the plea is objectionable as being multifarious. For the statement of more than one defense here causes the very situations which the plea was invented to avoid, namely, those of expense, delay,[84] and a complication of questions. Thus, a plea of the Statute of Limitations, and one that the plaintiff is not the administrator of the estate in behalf of which he sues, serve to make the pleading double.[85]

But a pleading is not double if the additional statements do not raise more than one point of law,

[82] Langdell, Equity Pleading (2d ed.), § 99.
[83] Rhode Island v. Massachusetts, 14 Pet. 210, 229 (U. S.).
[84] Rhode Island v. Massachusetts, 14 Pet. 210, 219 (U. S.).
[85] Goodrich v. Pendleton, 3 Johns. Chan. 384 (N. Y.).

although they may be unnecessary and, therefore, objectionable on that ground. And this is true even if the additional words, or even the same words, attempt to state more than one defense but fail either because of insufficiency of statement or of substance. If two or more defenses are not stated the plea cannot be double, however objectionable it may be on other grounds.

Though the plea is not the proper pleading by which a question of law, apparent upon the face of the bill, is raised, if it does raise such a question, and in addition plead facts stating another point as a defense, the plea is double.[86]

60. **Multifarious pleas sometimes allowed.**—But equity pleading does not favor pushing a rule to the extent of embarrassing the administration of justice, and where great inconvenience might otherwise be sustained under particular circumstances, the court may sometimes, in its discretion, allow several pleas.[87] Thus, a plea that the plaintiff is not heir, as stated in his bill, and a plea of the Statute of Limitations, have been allowed in the same plea.[88] But the defendant cannot file such a plea without permission of the court given upon an application[89] showing good grounds for the indulgence.

61. **Separate pleas to separate parts of bill.**—But the rule given above against multifariousness does not mean that the defendant cannot plead sep-

[86] Hostetter Co. v. Lyons Co., 99 Fed. 735, 736.
[87] Lord Langdale in Kay v. Marshall, 1 Keen 190, 197 (Eng.).
[88] Bampton v. Birchall, 4 Beav. 558 (Eng.).
[89] McCloskey v. Barr, 38 Fed. 165.

arate pleas to different parts of the same bill; it merely prohibits his pleading, without permission, more than one defense to the whole bill, or to the same separate part of it, for a bill may have pleaded several distinct causes of action, or it may have set up a cause of action for relief and charged facts for discovery. In these and similar cases, a plea to each is not only proper but necessary, if the defendant desires to defend against them.[90]

62. **Statement of plea.**—The plea must obey the rules of good pleading as in case of the allegations of the bill. If it states facts, they must be stated positively, and must be identified with certainty. The statements themselves must not be evasive nor argumentative,[91] for notice cannot be given the court and the plaintiff, and issues cannot be produced without obedience to the fundamentals of pleading. Conclusions of law cannot be used to assert a defense or a necessary part thereof. Immaterial statements are impertinent and may be expunged.

63. **Pleas classified.**—Three different bases or means are used in the classification of pleas, namely: (1) The method of pleading used. (2) The essentials of the bill, generally called the grounds of the plea. (3) The effect of the plea.

According to the first, pleas are either pure or not pure. If they assert the existence of new facts, they are of the former class; if they deny the existence of some fact or facts in the bill, and in addi-

[90] 1 Daniel, Chancery, *610; Simkins, Federal Suit in Equity, p. 416.
[91] Simkins, Federal Suit in Equity (2d ed.), p. 416.

tion assert new facts, or if they only deny facts stated in the bill, they are of the latter.

Possibly a better classification upon the same basis is made by some of the authorities, who divide them into the following three classes: (1) pure, (2) anomalous, and (3) negative pleas.[92]

According to the second means of classification, pleas are of the following classes: (1) to the relief, (2) to the discovery, and (3) to both.[93]

The third classification refers to the effect of the plea, following the division of pleas at common law into two sorts—pleas in abatement and pleas in bar. The former question the propriety of the remedy, or the legal sufficiency of the process, rather than deny the cause of action; the latter dispute the very cause of action itself. However, it nowhere appears that any practical consequences in equity result from this division, and accordingly, the different pleas will be briefly considered according to the first two divisions.[94]

64. **Pure plea.**—A pure plea is one which asserts the existence of a fact or set of facts from which a proposition of law can be deduced to delay the suit, or abate it, or defeat the cause of action, or prevent making discovery in an answer. Its peculiar office, as distinguished from the other pleas under the same classification, is to bring new facts into the case for the above purpose.

In this connection, it must be understood that

[92] Story, Equity Pleading (10th ed.), § 651.
[93] Same, §§ 704, 816.
[94] 1 Daniel, Chancery, *626, 627.

facts stated in the charging part of the bill, as the anticipated defense claimed by the defendant, are not yet in court for the benefit of the defendant, since plaintiff has no right to bind the defendant by any statement of what the defendant may claim in the suit. The defendant has the right to bring in his own defense. If it consists of new facts, he states them in a pure plea.

65. **Anomalous plea.**—This plea states new facts and negatives some of the facts contained in the bill.[95] It is both affirmative and negative in character, and, therefore, as distinguished from the other two, anomalous. It is a plea not pure, since it is not confined strictly to the assertion of new facts.

This class of pleas owes its origin to the change made in the pleadings in equity. Originally, bills were very simple in their frame. The plaintiff filed his bill in which he set up his claim. The defendant, if he did not demur for good reason, stated his defense, in a plea to which the plaintiff made his replication. If this contained new facts which confessed the existence of facts in the plea and avoided their legal effect, the defendant used a rejoinder to bring issues of fact to issue, following the analogy of the common law system of pleading. But this order fell into disuse, and the plaintiff, instead of merely stating his cause of action in his bill, also anticipated the defense and charged it as being claimed by the defendant, and then, in addition, proceeded to charge other facts to avoid that defense (thus filling the office of both the old bill and the

[95] Story, Equity Pleading (10th ed.), § 680.

former replication), requiring also that the defendant make discovery of the facts charged. Consequently a change became necessary in the way defendant should make his defense. His plea stated affirmatively his defense, then proceeded to negative the facts of the bill which were stated to avoid his anticipated defense. And as plaintiff sought a discovery of certain evidence charged, the defendant was compelled to discover or to deny the existence of such evidentiary facts. This he could not do in his plea, so he also filed an answer in support of his plea, of which more will be said hereafter.[96]

The denials in the anomalous plea may be either general or explicit, the only requirements being that the charges in the bill must be fully met.[97]

66. **Negative plea.**—Originally designed to set up new facts which revealed a question of law that would avoid giving discovery, the plea where the circumstances required the defendant to negative charges of evidence stated in the bill, contained negative allegations, such plea being termed anomalous. This paved the way for the plea which was solely negative, containing nothing beyond a denial of a certain fact or set of facts stated in the bill. At first, such a plea was disallowed, but later became fully established in the practice.[98] For example, if the jurisdiction of the court in a suit for divorce depends upon the residence of the parties within the territorial limits of the court's jurisdiction, it is

[96] Story, Equity Pleading (10th ed.), §§ 676, 678.
[97] Harrison v. Farrington, 38 N. J. Eq. 358.
[98] Langdell, Equity Pleading (2d ed.), § 102, note 1.

proper to deny by plea the statement of fact that the defendant "resides in Jefferson County, Illinois,"[99] since this saves the expense of a general hearing on the merits of the case. Even a better reason is found in the fact that the negative plea may save discovery in cases where the plaintiff, by falsely alleging title in himself, seeks to compel the exposure of the transactions of a commercial house or even of the private affairs of a family.

An answer in support of a negative plea is unnecessary unless, under certain circumstances, discovery is especially sought by the bill, and the defendant is required to answer interrogatories.[1] These special circumstances will be considered later.[2]

67. **Same subject — Limitations.** — The negative plea must deny the fact or set of facts the existence of which must be established in order to maintain the equity of the bill; that is to say, it cannot deny the ultimate facts of the cause of action, but is limited to that fact or set of facts which show one single point necessary to maintain the action. To illustrate the difference: in a suit for the infringement of a patent, a denial of the infringement would compel the examination of witnesses to establish that the defendant made, used, or vended the patented article. Now, the very object of the plea is to avoid this general examination.[3] On the other hand, a denial of the allegation of the bill that the patented

[99] Spangler v. Spangler, 19 Ill. App. 28.

[1] 1 Daniel, Chancery, *619.

[2] § 67, post.

[3] Korn v. Wiebusch, 33 Fed. 50.

article "had not been in public use or on sale for more than two years before the application therefor" puts in issue a fact that affects the patentability of the article.[4] Therefore, a denial of the facts to show infringement belongs to an answer, while the denial of one single fact to show patentability may be made in a negative plea.[5]

68. **Plea to the essentials of the bill.**—Pleas to the essentials of a bill for relief, or for discovery, or for both, are classified according to the essential point attacked, as follows: (1) To the jurisdiction; (2) to the person; (3) to the frame of the bill, and (4) in bar.

69. **Pleas to jurisdiction.**—Pleas to the jurisdiction are arranged under four heads: (a) That the subject matter of the bill is not within the cognizance of any court of justice; (b) That it is not within the jurisdiction of any court of equity; (c) That some other court of equity is vested with the proper jurisdiction, and (d) That some other court has the proper jurisdiction.

A discussion of each of the above and of the following three sections, would extend this article beyond its limits, and the reader is referred to the treatises upon the subject.[6]

70. **Plea to the person.**—These pleas object to the ability of the parties to sue or to be sued, and are of two kinds: (1) To the person of the plaintiff, and (2) to the person of the defendant. Those of

[4] Blessing v. Trageser Steam Copper Works, 34 Fed. 753.

[5] Story, Equity Pleading (10th ed.), § 652.

[6] Story, Equity Pleading (10th ed.), §§ 705-837; 1 Daniel, Chancery, *603-681.

the first class may be subdivided ordinarily into the following: (a) of attainder; (b) of alienage; (c) of infancy; (d) of coverture; (e) of idiocy or lunacy; (f) of bankruptcy or insolvency, and (g) of the want of the character in which the plaintiff sues, such as that of administrator or other personal representative.[7]

Of the pleas to the person of the defendant, it may be said briefly that persons attainted or outlawed cannot plead their own disability to a bill against them, but as to the other classes named above, it will be a good defense to the suit that the defendant is not the person that he is stated to be, or that he does not sustain the character in which he is sued, such as, heir, administrator, or as partner, and the like.[8] But a bankrupt may still be a party defendant if he be required for the determination of the controversy, as in case of discovery, or other relief for the purpose of assisting the investigation of the demands affecting the estate.[9]

71. **Pleas to the frame of the bill.**—These pleas differ from pleas to the jurisdiction in that they do not dispute the power of the court to hear and determine the controversy; from pleas to the person in that they admit the ability of the parties to sue and be sued; and from the pleas in bar because they do not deny the validity of the right, which is the subject of the suit, though they do assert that the right ought not to be examined in the existing record. They have been arranged under the following heads:

[7] Story, Equity Pleading (10th ed.), § 722.
[8] Story, Equity Pleading (10th ed.), § 732.
[9] Same, § 397.

(a) pendency of another suit; (b) want of parties; (c) multiplicity of suits; (d) multifariousness of the causes of action.

72. **Another action pending.**—Briefly, it may be said that another action is pending, when it is in another equity court of the same sovereign upon the same subject matter, between the same parties acting in the same right. The reason for the rule is that if the complaining party has already an action pending in which he can obtain full relief, there is no justification in harassing the defendant by a second action for the same subject matter.[10] But both suits must be in the jurisdiction of the same sovereign.

73. **Defect of parties.**—But little more need be said in addition to what has already been said on this subject. If some person or persons have been omitted from the bill, who are essential to the determination of the controversy, the defendant may demur, if the defect is apparent upon the face of the bill; otherwise he must plead the facts showing how and in what manner the absent person is essential to the suit.

74. **Multiplicity of suits.**—It is against the policy of equity to permit or to encourage a multiplicity of suits if the causes of action can be joined. Accordingly, if other facts than those appearing upon the face of the bill are necessary to show that there is a multiplicity of suits, the facts to show the same may be stated in a plea.[11]

[10] Radford v. Folsom, 14 Fed. 97.

[11] Story, Equity Pleading (10th ed.), § 746.

75. **Multifariousness.**—This fault is generally apparent upon the face of the bill; if not, then a plea stating the facts necessary to show the multifariousness of the bill may be used.[12]

76. **Pleas in bar.**—The principal classes of these pleas are as follows: (1) Those founded upon some bar created by statute; (2) those founded upon some record, or as of record, of some court; (3) those which consist of matters of fact, not of record. Of the first sort are such as depend upon the Statute of Limitations and the Statute of Frauds. Of the second sort are those based on judgments in courts of law, matters as of record, and decrees of a court of equity. The facts therein recited, in the absence of a showing of fraud, are taken as true. Of the third class, the principal pleas consist of releases, purchase for a valuable consideration, and laches. If the subject matter of the suit has been released by the plaintiff or the person under whom he claims, he will be bound, in the absence of fraud, or other objection which avoids a release. Under some circumstances, one who purchases the title or subject for value and without notice of the claims of others, in a situation where the law does not require him to ascertain the claims of others or take the risk of other claimants, may defend against any other claimants. Finally, if the plaintiff has waited an unreasonable time before bringing suit, he will be barred from pressing his claim.

77. **Determination of plea.**—It is not proper practice to dispose of a plea by demurrer, but a court

[12] Story, Equity Pleading (10th ed.), § 747.

of equity, in its desire to determine the point raised, has treated the demurrer as equivalent to setting the case down for hearing, which is the proper way to attack the plea for insufficiency of form or of substance.[13] If the defendant is anxious to have the point settled, he may, himself, take the same proceeding. Upon argument, the plea may either be allowed, or overruled, or the benefit of it may be saved to the hearing on the fact, or it may be ordered to stand for an answer.[14]

78. **Consequences.**—If a pure or anomalous plea is allowed, the plaintiff may, by a denial in his replication, take issue upon the existence of the fact stated. If the defendant proves the facts in his plea, the suit, so far as the plea extends, is barred, even though the plea may not be good in form or substance.[15] If he fail, the court will order that he answer.

If the plea be overruled, the defendant, unless the court orders otherwise, must pay the costs occasioned thereby and may then make a new defense by a plea or by an answer.[16] If the benefit of the plea be saved to the hearing, the plaintiff has an opportunity to file replication to the plea, if that be necessary to bring to issue the existence of the facts raised by the plea, and the evidence thereon is gone into.[17]

If, upon argument, when the plea is set down for

[13] Spangler v. Spangler, 19 Ill. App. 28.
[14] Story, Equity Pleading (10th ed.), § 697.
[15] 1 Daniel, Chancery, *697.
[16] 1 Daniel, Chancery, *702.
[17] Same, *699.

hearing on its sufficiency, the court holds that the facts of the plea may be a defense or part of a defense, but that it has been informally pleaded, or is not properly supported by an answer, so that the truth is doubtful, the plea may be directed to stand for an answer. If so ordered, it is allowed to be a sufficient answer to so much of the bill as it covers, unless the order also gives the plaintiff liberty to except to the plea therefor.[18]

3. The Answer

79. **Place of the answer.**—If the defendant does not succeed with a demurrer or with his plea, or, if he does not choose to file either of these, he must file a pleading called an answer. If he does not do this, he will not be permitted to prove any defense, and judgment pro confesso may be taken against him, as hereafter explained.[19]

80. **Double office of the answer.**—It will be remembered that the plaintiff might seek in equity an equitable remedy for an equitable cause of action, or discovery in aid of another proceeding, or he might have the latter as incidental to the former. The defendant, therefore, may have to plead to the ultimate facts stated to show cause of action and also to furnish the facts sought by discovery. He may do both of these in his answer, which serves the double purpose of a pleading to the merits and furnishing the evidentiary facts sought for discovery. So far as it meets the cause of action, it is a plead-

[18] Kirby v. Taylor, 6 Johns. Chan. 242 (N. Y.).
[19] § 101.

ing; so far as it serves the plaintiff's purpose of discovering facts, it is evidence reduced to writing.[20]

81. **Answer must meet the whole bill.**—Subject to an exception, hereafter noticed, the defendant must meet the whole bill, and, therefore, if he should choose to answer or is compelled to answer, his answer must meet such parts of the bill as are not already covered by demurrer or plea. If neither of these has been used, then his answer must meet all the allegations and charges in the bill and all the interrogatories based upon and incidental to them.

In some jurisdictions, a statement of fact may be answered by a formal denial of all the facts, and in the federal court, all allegations other than of value or amount of damage are deemed confessed if not denied.

But if the bill searches the conscience of the defendant, a general denial, or no denial, is not sufficient. He must answer specifically, admitting this fact, denying that, or stating that he has no knowledge, information, or belief of such fact, and that, therefore, he denies it. This is because the plaintiff has the right to search the conscience of the defendant, if the facts of the bill justify the search. Under such circumstances, the defendant will not be allowed to remain silent; the plaintiff is entitled to know whether the defendant has any relevant knowledge, information, or belief, and, if he has, what such knowledge, information, or belief is.

As an exception to the general rule, the defendant is not compelled to answer any matters or state-

[20] Holt v. Daniels, 61 Vt. 89.

ments which are not materially a part of the case stated in the bill, but if he does discover as to circumstances or conversation, he must state the whole.[21]

82. **Knowledge, information, and belief.**—Generally, if a fact is charged as within the defendant's own knowledge, as of something done by himself, he must answer as to his knowledge, and not as to his remembrance and belief. In many cases, he cannot say that he has no knowledge, information, or belief of the facts, since the circumstances may be such that, as a matter of law, he is bound to know, as in case of a principal, where actual knowledge may be possessed by the agent. In such case, he is bound to inquire before answering.

In case of an interrogatory pertinent to a charge in the bill, requiring the defendant to answer it "as to his knowledge, remembrance, information and belief," which is the usual formulary, it is not sufficient for the defendant to answer as to his knowledge; but he must answer, also, as to his information and belief,[22] for searching the conscience of the defendant allows plaintiff to interrogate him as to his information and belief as well as to his knowledge. This is especially true in cases where the defendant claims to be an innocent purchaser for value, without notice. He might have no knowledge and yet have such information and belief as would put him upon inquiry.

83. **On interrogatories.**—In some courts, the de-

[21] Story, Equity Pleading (10th ed.), § 857.
[22] Brooks v. Byam, 1 Story 296 (U. S.).

fendant is not required to answer charges in a bill, unless specially interrogated thereto. This is the rule in the federal court, but other jurisdictions hold the contrary. To prevent evasion and consequent delay, it is better to add interrogatories concerning the matters considered to be most essential; yet under the general rule, where the general interrogatory or requisition is "that the defendants may, severally and respectively, full, true, direct, and perfect answers make to all and each of the statements and charges of the bill, as if the same were repeated, and they and every one of them distinctly interrogated thereto," the answer is defective if it omits to meet all the material charges and statements.[23]

84. **Answer must obey the general rules of pleading.**—The answer must obey the general rules of pleading, which are: (1) It must state facts and not arguments; (2) it must allege facts positively, unless it states the fact to be upon information and belief; (3) it must be certain, so far as the nature of the case will permit; (4) it must not contain impertinent matter; (5) it must set forth the defense which defendant wishes to introduce in evidence, for he will not be permitted to prove something of which he has not notified the plaintiff by his pleading. Thus, if his defense is fraud on the part of the plaintiff he must plead the ultimate facts to show the fraud. As the rule is generally stated, the pleading and proof must correspond.

85. **Objectionable answers.**—An answer may be objectionable upon any one of three grounds, namely,

[23] Miles v. Miles, 27 N. H. 440.

because some of its statements are either scandalous or impertinent, or because it is insufficient in not answering fully the statements of the bill.

Scandalous or impertinent statements will be expunged upon exception taken thereto, or, in the federal court, on motion to strike out, specifically pointing out the objectionable matter. Objections for insufficiency are not made by demurrer, as in pleading at common law, but by exception for such insufficiency.[24]

86. **Irrelevant facts.**—In equity pleading, facts which are not relevant to the cause of action or discovery sought in the bill, or to the defense or to the discovery made by the defendant in his pleadings appropriate to defense or to discovery, should not be contained in the pleading and may be expunged after proper and timely application to the court.

Such irrelevant facts are of two classes, namely, those that are scandalous and those that are impertinent. The first consists of such facts as are unnecessary to state the cause of action, or the discovery sought, or the defense, or the discovery given, and which also reflect upon the character or reputation of the other party or of some third person. The second likewise consists of facts unnecessary or useless for the purposes of the suit.

87. **When answer is not binding upon plaintiff.**—An answer under oath is not binding upon plaintiff so as to require him to overcome it, in the following instances:

(1) As to new facts stated to avoid or discharge

[24] Story, Equity Pleading (10th ed.), §§ 861-864.

the case made by the bill; (2) when the matters stated in the answer are absurd or contradictory in themselves, or are such as make the facts stated in the bill more probable; (3) when the answer is not direct, positive, and unequivocal, in its denials or explanations; (4) when on information and belief only; (5) when the answer itself shows, or it is apparent from the situation of the defendant, that he swears to matters of which he cannot have personal knowledge; (6) when the answer is discredited as to one point, and the effect of the facts as to other points is impaired or destroyed, according to the circumstances of the case; (7) when the defendant professes ignorance of any or all of the matters stated in the bill, the plaintiff, at most, is required only to prove such matters; (8) when the answer denies legal conclusions.[25]

88. **Effect of the plaintiff's waiver of oath.**—The power of the plaintiff to compel the defendant to answer without oath is not uniformly established. Indeed, it may be said that the general rule is that such a waiver is not binding upon the defendant and that he may nevertheless answer under oath and thus make discovery, which, if favorable to him, must be overcome by the plaintiff.[26] But in some states, by statute or practice, the rule is the contrary.[27]

89. **When the answer is not under oath.**—The authorities have not clearly established the effect of the answer when it is not under oath but is yet responsive to facts charged in the bill. If the facts

[25] Story, Equity Pleading (10th ed.), § 849, note b.
[26] Story, Equity Pleading (10th ed.), § 874, note a, and cases cited.
[27] Same.

discovered are favorable to defendant and are responsive to the bill, it is not clear that he should not have the benefit of them, particularly when the opposing evidence of the plaintiff is either defective, obscure, doubtful, or unsatisfactory.[28] But clearly, if the answer is favorable to the plaintiff, it should have the effect of an admission against the defendant. Such facts are binding upon the defendant because he states them. For the same reason, all facts asserted or admitted by him, whether by way of discovery or as new facts stated to confess and avoid the case made by the bill, are likewise binding.

90. **Effect of answer.**—When the bill requires the defendant to discover under oath as to facts stated or charged, the facts discovered in the answer are binding upon both parties to the following extent and under the following circumstances: They are binding upon the plaintiff to the extent that they are directly responsive to the facts called for by the bill, when the facts discovered are directly and positively asserted. But they are not conclusively binding upon the plaintiff. He may overcome them by the testimony of two or more witnesses, or of one witness and strong circumstances in corroboration.[29] They are binding because plaintiff called for them; they are not conclusively binding for the reason that this would be unfair to plaintiff, since it would place him at the mercy of the defendant.

91. **Answer in support of the plea.**—The answer in support of the plea is no part of the defense, but

[28] Story, Equity Pleading (10th ed.), § 875, note a.
[29] Moors v. Moors, 17 N. H. 481.

is properly a discovery of that evidence which the plaintiff rightfully requires by his bill in order to invalidate the defense made by the plea. Under the practice, the plea may be set down for argument as to its sufficiency and the statements made in the answer as discovery to the evidentiary facts charged in the bill are taken as true at the time of the argument. If, therefore, they show that the defense set up in the plea is not true, or is avoided, then the defense is invalidated thereby. An able writer has explained the matter substantially as follows: It is the right of the plaintiff, as a general rule, to examine the defendant upon oath as to all matters of fact, well pleaded in the bill, which are material to the proof of the plaintiff's case, and which the defendant does not, by his form of pleading, admit. Ordinarily, the answer, if one is made, consists of two parts: (1) the defense upon the merits of the case stated; and (2) the defendant's discovery as to the facts about which he is interrogated; or, in other words, his examination on oath as to all the material (ultimate) facts of which a discovery is sought.

In such a case, the examination is merely evidence in the cause, and is altogether independent of the matter of the defense. Now, if, instead of a general answer, the defendant should put in a plea negativing the material (ultimate) facts on which the claim for relief is founded, if there were no accompanying answer, which should contain a discovery and response to the facts charged in the bill, the plaintiff would be deprived of the very discovery sought and perhaps also of all the proof which he

could bring forward to sustain the allegations of the bill. The answer, therefore, is strictly in support of the plea, and, also, proof to the discovery of which the plaintiff is entitled notwithstanding the plea. The plea, without it, cannot correctly be said to be a complete answer to the bill, for, although it repels the facts stated by the plaintiff, it does not repel the right to a discovery of the facts from the conscience of the defendant.[30]

92. **When no answer is required.**—No answer is required unless the bill charges specific facts to which the answer is a proper response, and this charge may be made in either of two ways, namely, either by stating a particular fact and charging that the evidence thereof is in the possession of the defendant, or by a general fact, such as that upon which the title of the plaintiff is founded, and charging particular facts to prove the general fact, and requiring discovery thereof from the defendant. Unless the defendant is distinctly informed of the particular matters affecting the ultimate fact or facts as to which the plaintiff seeks discovery, the defendant does not know what he is to answer and, therefore, is not required to answer at all.[31]

4. The Cross-Bill.

93. **Definition.**—The defendant may have a claim against the plaintiff or a co-defendant growing out of the same matter or of a similar nature, or he may wish some affirmative relief in his favor. For this

[30] Wigram, Discovery (1st ed.), pp. 10-13; same (2d ed.), pp. 10-11.
[31] Story, Equity Pleading (10th ed.), §§ 681, 682.

purpose, he must file a pleading called a cross-bill, in which he is the plaintiff and the other parties are defendants. It does not make a new suit, being only auxiliary. New matters and new issues germane to the original bill are thus set up, but if the purpose of the cross-bill be different from that of the original bill, it cannot be maintained. Briefly, it is used, either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill.[32]

Under the new rules, in the federal courts, matters formerly set up in the cross-bill are now raised by answer.[33] If the counter-claim arises out of the same transaction, it must be stated in the answer; if the claim is such as may be set off against the plaintiff or is a counter-claim which might have been the subject of an independent suit against the plaintiff, it may be brought in by the answer instead of by cross-bill.

[32] Simkins, Federal Suit in Equity (2d ed.), pp. 469-471.
[33] New Federal Equity Rules, rule 30.

CHAPTER III.

AMENDMENTS, SUPPLEMENTAL PLEADINGS, JUDGMENTS PRO CONFESSO, AND DECREES.

94. **Amendments—In general.**—Courts of equity seek the substantial merits of the case. Therefore, they will overlook mere formal defects unless timely attention is called to them, or will allow amendments to be made.

Substantial defects may be amended if the cause is in such a stage that the rights of the adversary party will not be substantially prejudiced thereby and inconvenience will not be occasioned the court. No uniform rule can be stated, as the matter rests in the sound discretion of the court, dependent upon the circumstances of each case.[84]

95. **Amendments of the bill.**—Greater indulgence is allowed the plaintiff than the defendant in the matter of amendments because mistakes are more likely to occur in getting the facts of the plaintiff's case.

Amendments may be allowed in order to add a proper party, to change or enlarge the prayer for relief, to add some fact or circumstance omitted by excusable oversight or through excusable ignorance of the existence of the fact, or because of facts pleaded in the answer.

But the plaintiff will not be permitted to make a

[84] Hardin v. Boyd, 113 U. S. 756, 761.

new case.[35] In bills for an injunction, the rule is stricter than is usual, for the plaintiff must swear to his amendment as well as show an excuse for not having incorporated it in the bill.[36]

Special replications having been abolished in most jurisdictions, when the plaintiff desires to confess the existence of the facts stated in the answer and to avoid their legal effect by stating other facts not yet in any of the pleadings, he may obtain permission to amend his bill and anticipate the defense set up in the answer. This, as has been stated, is done in the charging part of the bill, where the plaintiff then anticipates the defense by stating the new facts.[37]

96. **Amendments of defendant's pleadings.**—Defendant may amend his pleading, but this is allowed with much more caution than in the case of the plaintiff.[38]

Since a demurrer is never good in part and bad in part, raising, as it does, a single point of law, it is rare that it is possible to amend it. But the court may, upon proper terms, allow it to be narrowed by an amendment.[39]

With respect to pleas, amendments may be made in case of evident mistake when the defense seems to be sufficient.

But in case of answers and pleas made under oath, amendments are not easily granted, since statements

[35] Verplanck v. Mercantile Insurance Co., 1 Edw. Chan. 84 (N. Y.).
[36] Same.
[37] Connorton v. Miller, 41 Mich. 1.
[38] Story, Equity Pleading (10th ed.), § 894.
[39] Same.

made under oath should be carefully considered before being made. When granted, amendment will be only for an obvious mistake in dates or omission of a fact through inadvertency.[40]

97. **When amendments may be made.**—Amendments of formal defects may be allowed at any time, but they may be refused where delay will result. After answer, amendments of the bill are more rarely permitted. But after the examination of witnesses, the pleadings are not altered or amended except under very special circumstances, or in consequence of some subsequent event, unless it be for the sole purpose of adding parties.[41]

At the final hearing, amendments may be allowed when necessary to substantial justice. After decree, amendments are not often allowed except to correct a clerical error.

In the federal courts, the court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, pleading, proceeding or record to be amended, or material supplemental matter may be set forth in an amended or supplemental pleading.[42] Before defendant pleads, plaintiff may amend without application, but after defendant's pleading is filed, he must obtain defendant's consent or leave of the court.

98. **Supplemental pleadings.**—Where the imperfection in the original bill arose from the omission of some material fact which existed at the time of

[40] Smith v. Babcock, 3 Sum. 583 (U. S.).
[41] Thorn v. Germand, 4 Johns. Chan. 363 (N. Y.).
[42] New Federal Equity Rules, rule 19.

filing of the pleading, the omitted fact is added by amendment, provided the plaintiff makes his application in time and shows that the fact was not known to him at the time and was not discoverable by the exercise of due diligence. But facts which originate after the pleading was filed and which are material to the cause, such as a new party to whom rights have accrued touching the subject matter of the controversy, may be added by a supplemental pleading; and, sometimes, facts which existed prior to the filing, but which could not have been discovered by due diligence, may be added by supplement, when the time for amendment has passed.

But the new facts must not change the rights and interests of the parties, though they may change the relief prayed in the original bill.[43]

99. **Exceptions.**—An exception to an answer for insufficiency is made in writing, stating specifically the parts of the bill which are claimed not to be answered, and praying that the defendant be required to answer fully. It must be signed by counsel and delivered to the proper officer within a limited time allowed therefor. Where there are several defendants and each has answered separately, separate exception must be taken to each answer; but if there is a joint answer, but one exception need be made. All grounds of objection for insufficiency should be made in the exception, for if the defendant amends or files a new answer to a new bill which plaintiff took leave to file after his exception was allowed, plaintiff will not be permitted additional

[43] Story, Equity Pleading (10th ed.), § 336.

grounds of insufficiency, since the objections should have been made before.[44] In the federal courts, objections, formerly made by exception, are now made by motion.

100. **Hearing on exceptions.**—If the defendant believes his answer sufficient, the determination of the matter is referred to an officer of the court called a special or general master, who looks into the bill, answer and the exception, and makes a written report thereon. If the report decides the answer insufficient, the defendant must answer again with a corrected answer; but if he conceives the answer to be good, he takes an exception to the report and thus brings the matter before the court for his ruling thereon.[45]

Under the federal practice, the motion to dismiss or other appropriate application is heard by the court, as a general rule, references now being unusual, save in matters of account.[46]

101. **Judgment pro confesso.**—The defendant has the option of making a defense. If he does not, he will not be able to prove any at the hearing. But he does not thereby impliedly admit the existence of the ultimate facts stated in the bill to show the cause of action. However, his failure to plead places him theoretically in contempt of the court and the practice arose to hold not only that he is contumacious but that upon application by the plaintiff the court will order that the facts showing the plain-

[44] Story, Equity Pleading (10th ed.), § 864.
[45] Story, Equity Pleading (10th ed.), § 865.
[46] New Federal Equity Rules, rule 59.

tiff's cause of action shall be taken as true. Judgment pro confesso is then taken against him and the court proceeds to give the plaintiff such a decree as the ultimate facts of his bill will warrant without proof of their existence. If the bill does not state a cause of action, the decree, which is the formal judgment of the court, cannot be granted. If it does, the decree does not, however, give the facts sought to be discovered, for these are within the conscience of the defendant and are unknown to the court and the plaintiff. But the judgment pro confesso only goes to the equity of the bill and does not extend to the items sought. Thus, upon a bill for an accounting, the judgment is that plaintiff is entitled to an account, but it does not relieve him of the necessity of showing the amount due him, even though he may have fully set forth in his bill what he claims to be the true state of the accounts. At the hearing before the master, or court, he must offer proof, and the defendant has the right to appear and contest the amounts of the claims. The consequences of the failure to plead in equity, therefore, are the same as at law but not for the same reasons.[47]

102. **Decrees.**—During the progress of the case, the court may make an order as an additional step toward a final determination of the merits. Such an order is termed an interlocutory decree. But if the issues of the case are determined, and, without further judicial action, the rights and liabilities of the parties fixed, a final decree is entered; after that, the court has no more control over the decree, except

[47] Langdell, Equity Pleading (2d ed.), § 84.

to make such orders as may be necessary to enforce it. On the other hand, an interlocutory decree is under the control of the court and may be modified or set aside at any time and at any term until final decree. An appeal to the higher courts may be taken from a final but not from an interlocutory decree.

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LAW OF EVIDENCE

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PART I

RULES OF EXCLUSION

CHAPTER I.

PRELIMINARY CONSIDERATIONS.

1. **Evidence analyzed.**—What is evidence? The primary conception of it is that it is something which serves as a means to make facts clear and plain to the human understanding.

Suppose, for example, that A desires to show B that a certain substance has an odor. There are several means by which this may be made clear and plain to B.

A may apply the substance to B's nostrils and the sensation of smelling may at once produce in B's mind a conviction that what A maintains concerning the substance is so.

A, in B's presence, may ask C to smell the substance and C, upon doing so, may thrust it from him with an expression of displeasure; or, C, at A's re-

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quest, may only smell the substance, still in B's presence, and tell B it has a bad odor.

In the first case supposed, B immediately came by the knowledge of that which A sought to make clear and plain to him, as the result of an impression made by the substance upon his nostrils. Impressions also were made upon B's sense organs by external objects in the second case supposed: B saw C smell the substance and put it from him with apparent displeasure; or B saw C smell it and heard him say it was malodorous. True it is that by these physical impressions B may not at once know the fact attempted to be shown. Yet, by a conscious use of them, he may know it, for human minds have the faculty of assigning to events and things their efficient causes and, by arranging these in their proper relation, to distinguish the true from the false.

Thus, because experience has taught B that unpleasant odors cause involuntary distortion of the features, and are promptly removed from the reach of the nostrils, B may infer from C's conduct that the substance is disagreeable to smell and, therefore, has an odor; or, experience having taught him that men do not lie about unimportant matters, he may believe C when the latter says the substance is malodorous.

2. **Same subject.**—In the second case supposed how has evidence made clear and plain to B the fact sought to be shown? The process explained, that of deliberately inferring one fact from some other known fact, is the working of the laws of thought, or, to use a commoner phrase, the operation of rea-

soning. The material upon which this process operates is evidence. The facts that C smelled the substance and thrust it from him with apparent displeasure, or the facts that he smelled it and told B it was malodorous,[1] are material upon which B's reasoning may operate to convince him that the substance has an odor, because they may afford a foundation for an inference to that effect. They are, therefore, evidence of that fact.

Evidence, then, makes clear and plain indirectly, because it is material upon which reasoning may operate to demonstrate a condition clearly and plainly; because it may be used as the foundation for an inference that the fact or facts, which make up the situation to be made clear and plain, exist or do not exist. It may, of course, be necessary for reasoning to construe the fact or facts presented, before there may be any such foundation, but reasoning, unaided, cannot furnish that foundation. Something else is requisite. That something is evidence.

3. **Evidence defined and distinguished from reasoning.**—More specifically, then, evidence is any fact which may have the effect of inducing the mind to infer that another fact exists or does not exist.[2] But

[1] "For even direct testimony, to be believed or disbelieved, according as we trust the witness, is really but a basis of inference." Thayer, Cases on Evidence (2nd ed.), page 2.

[2] Evidence is nearly always defined in terms of "facts." There is in the popular mind a sense of the meaning of this term, which, while not susceptible of exact definition, is not, on that account, too vague to prevent the use of the word with adequate accuracy. It may serve, therefore, to promote clearer thinking simply to employ the term without defining it, with the assumption that it will be interpreted in its ordinary meaning; but, nevertheless, a general statement of its meaning may be helpful. "A

the distinction pointed out between evidence and reasoning is fundamental. It is rarely that the mere presentation of a fact will of itself alone have the effect of inducing the mind to infer the existence or non-existence of some other fact. If only a single fact is presented, it must, in nearly all cases, be construed with reference to facts already known; if the presentation is of a group of facts, the facts presented must, almost always, not only be so construed, but combined or strung together in a manner that leads to a conclusion, before that effect is produced. This difference between the presentation of a fact or facts, the effect of which may be to induce the mind to infer that another fact exists or does not exist, and the process by which the mind concludes whether the other fact exists or not, is the difference between evidence and reasoning.

4. **Judicial evidence and extra-judicial evidence distinguished.**—Evidence, in the sense in which the word is used by lawyers, has a narrower meaning than that ascribed to it in the untechnical talk of men. When lawyers speak of evidence, they mean evidence received by legal tribunals to show that facts, the existence of which is disputed before the tribunals, exist or do not exist. Evidence, in the larger sense first discussed, is called extra-judicial evidence. That just defined is called judicial evi-

fact, as the term is used in legal proceedings, is an event; a thing done or said. * * *. The condition or state of mind at a given time is a fact. If any emotion is felt, as grief, joy, or anger, the feeling is a fact. If the operations of the mind produce an effect, as knowledge, skill, or intention, this is a fact.'' Barr v. Chicago, St. L., etc., R. R. Company, 10 Ind. App. 433, 37 N. E. 815. See also Thayer, A Preliminary Treatise on Evidence at the Common Law, pp. 190-192.

dence,[3] and the various forms in which judicial evidence may be presented are: (1) "Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry";[4] (2) "Documents produced for the inspection of the court or judge";[5] (3) "That which is presented directly to the senses of the tribunal."[6]

5. **Testimony—Documentary evidence—Real evidence.**—Knowledge of facts acquired by a legal tribunal through the statements of witnesses made to it under a legal sanction in relation to matters of fact under inquiry, is said to be based upon testimony; that acquired by it through the reading of documents, produced for its inspection, is said to be based upon documentary evidence; that acquired by it through a personal examination of some thing, i. e., by the presentation of the thing directly to the senses of the tribunal, is said to be based upon real evidence.

6. **Evidential facts and ultimate facts.**—In the scheme of making things clear and plain to legal tribunals by presenting to them facts, from which the existence or non-existence of other disputed facts may be inferred, any fact which is used by a party thus to prove or disprove some other fact, material for him to prove or disprove, is called an "evidential fact";[7] the fact material to be proved or disproved is called an "ultimate fact."[8] For example: Upon

[3] It is in this sense that the word "evidence" is used hereafter, unless a contrary use of it is indicated.

[4] Stephen, Digest of Evidence (Chase's 2nd ed.), Art. 1.

[5] Idem.

[6] Thayer, Cases on Evidence (2nd ed.), page 2.

[7] The term is Professor Thayer's.

[8] Idem.

the trial of an indictment for murder it became material for the prosecution to show at what hour the moon rose on a certain night. To show this the prosecution offered, and the court received in evidence, a standard almanac containing tables which gave the periods of the rising and setting of the moon on each day of the year in question.[9] Here the fact that the moon rose at a certain time on a particular night was an "ultimate fact"; the fact that the almanac said it rose at a certain time on that night was an "evidential fact."

7. **Irrelevant matters inadmissible.**—Obviously it must be a basic principle of reasoning, that that which has not fitness for the reasoning process can have no place in it. Evidence has place in this process because it is the material upon which the process operates. But in every case where evidence is offered to a legal tribunal, certain specific facts are in dispute, and evidence of such disputed facts can be only any fact, the effect of which may be to induce the mind of the tribunal to infer that the disputed facts exist or do not exist. Therefore, in any legal proceeding, the evidentiary force of any fact consists in the inherent tendency of that fact to produce in the mind of the legal tribunal, before which it is offered, a conviction as to the existence or nonexistence of the facts in dispute, and, unless a fact have such tendency, it is not evidence in that proceeding and the tribunal will not receive it.

It is, therefore, a fundamental postulate of evidence, as the material upon which reasoning oper-

[9] Munshower v. The State, 55 Md. 11.

ates—as the groundwork of a rational process—that facts which are irrelevant to the existence or non-existence of the disputed facts in a given case are inadmissible. This is not a rule of the law of evidence, for irrelevant facts are not excluded by any peculiar rule of law at all, but by the fundamental rule of reasoning, which says that only those facts are admissible, in a given case, which serve as an aid to reasoning in that case. And what is it that determines in the particular case whether any given fact is irrelevant? To this question the law makes no answer. It silently assumes that its tribunals know the rules of logic and kindred sciences which will enable them to answer the question, and permits them, in answering it, the generous use of a discretion, the exercise of which a higher tribunal will not declare erroneous unless there has been a manifest abuse of it.

8. **Place of the law of evidence in the general scheme of the law.**—All law is concerned with the definition of rights, duties, and liabilities, and the provision of remedies for the enforcement of rights, duties, and liabilities. That part of the law which defines rights, duties, and liabilities is called the substantive law. That part of the law which deals with the remedies for the enforcement of rights, duties, and liabilities is termed the adjective law. The law of evidence is one branch of the adjective law.

9. **The law of evidence defined.**—The law of evidence is a set of rules, the chief operation of which is to prevent the presentation of certain classes of evidence to legal tribunals, but which also prescribe

the manner of the presentation of evidence which such rules do not exclude.

10. **The rules of the law of evidence distinguished from other rules of law.**—From the definition of the law of evidence it is apparent that until a tribunal has answered in any case the question, What is irrelevant? the law of evidence cannot come into operation: for, if that law operates chiefly to exclude certain classes of evidence, as well as to fix the manner in which evidence not excluded by it shall be presented, it is only upon relevant facts that it can operate, since facts that are irrelevant in any case are not evidence in that case.

And even before the question, What is irrelevant? is answered, the tribunal must know what the ultimate facts are concerning which evidence is required, that is, what facts constitute the case before it; but it is not the province of the law of evidence to inform legal tribunals in regard to such facts. For example: "A is indicted for the murder of B, and pleads not guilty. The following facts may be in issue: The fact that A killed B; the fact that at the time when A killed B he was prevented by disease from knowing right from wrong; the fact that A had received from B such provocation as would reduce his offense to manslaughter."[10] None of the facts which may constitute the case, put by way of illustration, can be known to a tribunal by any rule of the law of evidence. The fact that A killed B may be a part of the case because the sovereign power, by indicting

[10] The illustration is taken from Stephen, Digest of Evidence (Chase's 2nd ed.), Art. 2.

A for the murder of B, affirmed that fact, and A, by his plea of not guilty, denied it. Similarly, in civil cases, a statement is always made by the parties to the court in legal form of the facts constituting the plaintiff's cause of action, and of those constituting the defendant's answer thereto (unless the defendant objects to the legal sufficiency of the plaintiff's statement of claim). These statements are the pleadings and, by an examination of them, the court may learn some of the facts that go to make up a given case.

Again the fact that at the time when A killed B he was prevented by disease from knowing right from wrong, and the fact that he received from B such provocation as would reduce his crime to manslaughter, may be parts of the above case, and the court knows this may be so, because, from the substantive law of crimes, the court has learned that mental limitation of a certain degree may be an excuse for crime, and that the existence of that condition of mind, characterized as malice aforethought, is a necessary element in the crime of murder, and that such malice cannot exist where there is such provocation.

In this manner legal tribunals determine what are the ultimate facts of which evidence is required in a given case; partly by the use of the rules of the law of pleading, partly by the use of the rules of different branches of the substantive law, and without aid from the rules of the law of evidence.

11. **Same subject.**—It is to be observed, too, that there are some facts which, though logically proba-

tive of the ultimate facts of a case and not within the prohibition of any of the excluding rules of the law of evidence, are, nevertheless, made inadmissible by a rule of some branch of the substantive law. For example: A brings suit against B to recover damages for the breach of an oral agreement which, by its terms, was not to be performed within a year from the date on which it was made. A legal tribunal will not receive evidence to show the making of such a contract, over B's objection, for all oral agreements, not to be performed within a year from the date on which they are made, are rendered unenforcible in most jurisdictions by the Statute of Frauds. In those jurisdictions, admission of the proof would be error, but evidence of the existence of the agreement upon which suit is brought is not excluded by any rule of the law of evidence. It is made inadmissible by a statutory rule of the substantive law of contracts.

Having determined, then, first by the rules of pleading and of the various divisions of the substantive law, what are the ultimate facts in a given case concerning which evidence is required, and, secondly, by no rule of law at all, but by the ordinary processes of human reason, that any fact offered to be shown is evidential of these, i. e., logically probative of them, and, thirdly, having determined that such evidential fact is not rendered inadmissible by a rule of some branch of the substantive law, the tribunal, for the first time, is in a position to apply the rules of the law of evidence, to exclude any relevant fact made inadmissible by such rules, and to fix

the manner of the presentation of any such fact not so affected.[11]

12. **Relevant matters admissible.**—It follows that matters which are logically probative of the ultimate facts of a case, unless excluded by a rule of the law of evidence, or of some branch of the substantive law, are admissible. Nevertheless, the law of evidence consists, in the main, of a series of rules excluding, for reasons of policy connected with the jury, matters which are logically probative of such ultimate facts, and of a series of exceptions to such excluding rules. The reason why the law of evidence lies in this shape, is that the rule which in general admits matters which have a logical bearing upon the issues of a case, is not a rule of law, but a fundamental rule of human reason, whereas the rules which exclude matters logically relevant to an issue (other than those of the substantive law which have a like operation) are rules of legal policy associated with the jury, and are, therefore, rightly treated as rules of the law of evidence; so also, the exceptions to such excluding rules, being matters of legal policy, are rules of the law of evidence.

[11] See also Judicial Notice, § 167 et seq.; Presumptions, § 171 et seq.; Admissions, § 181 et seq.

CHAPTER II.

UNIMPORTANT, MISLEADING AND PREJUDICIAL MATTERS.[12]

13. **Introductory.**—High authority has observed that, to understand the common law, other tools are necessary besides logic.[13] This is pre-eminently true of those rules which have, for their chief operation, the prevention of a considering by legal tribunals of certain classes of evidence. The law of evidence is the offspring of the common law trial by jury, and the history of the evolution of that institution is the only explanation of that "excluding function" which is "the characteristic one in our law of evidence."[14]

The jury was, originally, a body of witnesses drawn from the vicinage, who were familiar with the matter in dispute, and who stated to the court, of their own knowledge, the facts involved, to which the court then applied the law. Such a method allowed the court to govern largely the outcome of a controversy. But, as the jury gradually got to be triers of the facts, the courts, looking upon the result jealously, and regarding jurors as likely victims of their sympathies, prejudices, and passions, fearing the ignorance of the new verdict-rendering power, and taking careful heed of its limitations, mental and

[12] The arrangement of these topics is taken from Thayer, Cases on Evidence (2nd ed.).

[13] Holmes, Common Law, page 1.

[14] Thayer, Cases on Evidence (2nd ed.), page 2.

physical, seeming and real, threw about it those rules which operate to shut out from its consideration many things logically probative of the matter controverted.

Therefore it has come to be that "some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous in their effect on the jury, and likely to be misused or overestimated by that body; others, as being impolitic or unsafe on public grounds; others, on the bare ground of precedent."[15]

14. **The rule stated.**—Many matters cannot be shown because they are likely to mislead the jury, or to be misused by it, or to prejudice a party, or to complicate the case unnecessarily, or because they are of slight, remote, or conjectural significance.[16]

15. **Typical cases.**—The matters inadmissible for any of the causes stated in this rule admit of no more definite classification. The rule assembles the reasons for several well settled lines of decisions and only in these decisions is its proper exposition to be found. For examples:

A, an employee in B's mill, is struck and injured by a piece of falling machinery. On the trial of an action to recover damages therefor, on the theory that B was negligent in providing defective machinery, evidence is offered by A to show the repair of the machinery by B subsequently to A's injury.[17]

[15] Thayer, Cases on Evidence (2nd ed.), page 3.

[16] Thayer, Cases on Evidence (2nd ed.), page 229.

[17] Columbia, etc., Railroad Company v. Hawthorne, 144 U. S. 202, LEADING ILLUSTRATIVE CASES.

A, while a passenger on B's railroad, is struck and injured by a movable partition, at the time being handled by the train porter in the discharge of his customary duties. On the trial in an action to recover damages therefor, on the theory that the porter was negligent in handling the partition, evidence is offered by B to show that the porter was usually careful, competent, courteous, and attentive.[18]

The City of X brings proceedings to acquire title to A's real property. Before the commissioners of appraisal evidence is offered by A to show what the City of X paid for B's property, which adjoins A's.[19]

A sues B, a drover, to recover the value of a pair of steers, alleged to have been lost through B's negligence. On the trial of the action evidence is offered by B to show what was the usual practice of drovers under circumstances similar to those in question.[20]

A, while leaving a building owned by B, falls into an unfenced area and is injured. On the trial of an action to recover damages therefor, on the theory that B was negligent in maintaining the area in an unfenced condition, evidence is offered by B to show that 10,000 people have passed and repassed the area since the building was erected without accident.[21]

On the trial of A for extorting money from B through a subordinate, evidence is offered by the prosecution to show that A, through the same subordinate, extorted money from others at other times.[22]

[18] Harriman v. Pullman Palace Car Company, 85 Fed. Rep. 353.
[19] Petition of Hubert O. Thompson, 127 N. Y. 463.
[20] Maynard v. Buck, 100 Mass. 40.
[21] Temperance Hall Association, etc. v. Giles, 33 N. J. L. 260.
[22] People v. McLaughlin, 150 N. Y. 365, 384, 44 N. E. 1017.

16. **The cases explained.**—The evidence offered in all these cases is objectionable on various grounds within the rule. That in the first case proposed to be shown, although it may have some tendency to prove that B knew of the unsafe condition of the machinery before A was injured, would, undoubtedly, mislead the jury to construe the subsequent alteration of the machinery as an admission by B that he was responsible for that condition. Again, it would probably create in the minds of the jurors a prejudice against B. Moreover, the real issue in the case is: Was B, up to the time of the accident, exercising that degree of care in respect to the maintenance of the machinery that a man of ordinary prudence would have exercised? The degree of care used by B after the accident is another matter, and evidence of it would unavoidably have the effect of withdrawing the minds of the jurors from the true issue.[28]

The evidence offered in the other cases is objectionable for some of the same reasons, but is particularly within the rule because of an inevitable tendency to multiply the issues and unnecessarily to complicate the case. The court is a human institution and the volume of its affairs is great. "The trial to which the parties are entitled is not an endless one, nor one unusually protracted and exhausting. There may be a vast amount of evidence, relevant in a certain * * * sense, but so unimportant, when

[28] For similar reasons, in an action to recover damages for injuries alleged to have been caused by negligence, evidence to show that the defendant was insured against accident was excluded. Sawyer v. Arnold Shoe Company, 90 Me. 369.

compared with an abundance of better evidence easily available, as to be properly excluded."[24]

17. **Corollaries to the rule.**—The cases discussed are typical in most jurisdictions and may be said to decide as corollaries to the rule above stated:

Evidence that a party took precautions against the future is not admissible to establish an admission by that party of responsibility for the past.

Evidence of the quality of the general conduct of a party, or of the quality of his conduct at other specific times, is not admissible to establish the quality of his conduct in a particular instance.[25]

Evidence of what was paid for other parcels of land, similarly situate, is not admissible to establish the value of a particular parcel of land.[26]

Evidence of what has been done with uniformity by others engaged in the same calling, is not admissible to establish that a particular business was conducted with due care in a specific instance.[27]

[24] Amoskeag Manufacturing Company v. Head, 59 N. H. 332.

[25] But to show the quality of the conduct of a party in a particular instance, evidence as to its effect upon others than the complaining party at the same time is not within the rule. Hunt v. Lowell Gas Light Company, 8 Allen 169 (Mass.). And where there is no direct evidence on either side as to the cause of the ultimate fact so sought to be shown, such evidence is admitted in some jurisdictions. Salem v. Webster, 192 Ill. 369. Cf. Zucker v. Whitridge, 205 N. Y. 50.

[26] To show the value of land to be acquired, evidence of actual sales of similar land in the vicinity near the time when the question of the value of the land to be acquired is to be determined, is not within the rule in some jurisdictions. See the cases cited in The Petition of Hubert O. Thompson, 127 N. Y. 463.

[27] But such evidence, offered to establish, in connection with all the other facts in a case, the degree of care an ordinarily prudent man would have exercised under circumstances in question, is not within the rule. Cass v. Boston & Lowell Railroad Company, 14 Allen 448 (Mass.). See also in this connection the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 37, note 1.

Evidence of the frequency (or infrequency) of accidents at a particular place is not admissible to establish the character of the place as dangerous (or safe).[28]

Evidence of the commission by a party of other and independent crimes is not admissible to establish the guilt of the party of a particular crime.[29]

18. **Matters not within the rule.**—In an analogous class of cases—nearly all actions to recover for the loss of property alleged to have been caused by fires started by sparks scattered as the result of the negligent operation of defendant's locomotives —to establish the cause of fire and the negligence of the defendant, evidence offered to show the operation of the defendant's locomotives at other times, in a manner likely to set on fire objects not more remote than the burned property, is held not to be within the rule, if every other probable cause of fire is first refuted.[30]

Where, too, one of the ultimate facts in a case is in its nature a continuous thing, since such a matter

[28] The fact that others were injured at the same place while its condition was the same as when the plaintiff was injured is not within the rule in some jurisdictions. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 38, note 1. And such evidence offered to establish knowledge by the defendant of the unsafe condition of the place, or a state of affairs from which the defendant ought to have had such knowledge, is not within the rule. Stephen, Digest of Evidence, supra.

[29] Evidence of the perpetration by an accused of other crimes independent of that for which he is tried, offered to establish a guilty mind, as a necessary element of a crime in question, since such a mental condition can be shown only by an accumulation of circumstances, is not within the rule. The Queen v. Francis, L. R. 2 C. C. R. 128 (Eng.); Commonwealth v. Robinson, 146 Mass. 571. See also the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 35, note 1; idem, page 21, note 5.

[30] Sheldon v. Hudson River Railroad, 14 N. Y. 218. See also Wigmore, Evidence, §§ 454, 455.

can be shown only by proof of successive acts of a similar kind, the rule does not apply. Thus, to prove that an animal is vicious and fractious by habit, evidence of its restive and unmanageable behavior previously and subsequently to an accident alleged to have been caused by the restive and unmanageable conduct of the animal on a particular occasion, is held not to be within the rule, unless the similar acts so sought to be shown happened at a time too remote from the accident.[31]

[31] Kennon v. Gilmer, 131 U. S. 22.

CHAPTER III.

CHARACTER.

19. **Character of parties to the litigation—The rule stated.**—The particular character of either party to a litigation cannot be shown to establish his conduct at any time, except in certain cases.

20. **Reason for the rule.**—Whenever a party is charged with doing, or with failure to do, a certain thing, evidence of the character of the party would clearly afford a basis for an inference that the party did, or failed to do, the thing charged, if such evidence showed him to be a person capable or incapable of doing the thing. Nevertheless, this species of evidence is very generally barred from the consideration of legal tribunals by the rule of the law of evidence stated above. "The evidence is relevant to the issue, but is excluded for reasons of policy and humanity, because, although, by admitting it, you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine."[32] Here, once more has distrust of the jury, as more susceptible to passion and prejudice than to affirmative proof, led to the adoption of an excluding rule, this time to shut out evidence of the character of the parties to a litigation.

21. **Character, when provable.**—The most important exception to the rule against evidence of char-

[32] Per Willes, J., in Regina v. Rowton, Leigh & Cave 520 (Eng.).

acter prescribes that, in all criminal cases,[33] evidence bearing upon that trait in the character of an accused involved in the crime charged, as such trait manifested itself before the commission of the crime, is admissible, when offered by the accused, to show his incapability to commit the crime. The exception began *in favorem vitae,* i. e., in capital cases, and has gradually come to be extended to all criminal cases.[34] The adoption of the exception in its broader form has often been stated to the effect that, while a good character, clearly established, in a criminal case is entitled to weight with a jury, it cannot avail against the positive testimony of credible witnesses. This is not the law. The jury must consider a good character, clearly established, with all other evidence upon the question of the guilt or innocence of an accused, in a criminal case.[35]

22. **Scope of the exception.**—Since it is only the character of an accused prior to the perpetration of the crime charged that may be the basis for an inference as to his capability or incapability to commit it, only evidence of what his character was before the commission of the crime charged is within the exception. Such evidence of character, also, must appertain to the human trait related to the offense alleged.[36] If the indictment is for larceny, evidence of the mild temper of the accused is inadmissible,

[33] In civil actions evidence of the character of a party is in general inadmissible. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 160, note 1.

[34] Commonwealth v. Hardy, 2 Mass. 303.

[35] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 158, note 1.

[36] Idem.

although it would be within the exception, if assault were the crime laid in the indictment. The honesty of the accused is the relevant moral trait when larceny is the charge. Nor is evidence of the character of an accused in criminal cases within the exception, unless evidence of good character is offered in the first instance by the accused; but once an accused offers such evidence, then evidence which bears on that trait in his character involved in the crime charged, as such trait was manifested before the commission of the crime, is within the exception when offered by the prosecution to show his capability to commit the crime.[37]

23. **Another exception.**—Establishing another exception to the rule excluding character evidence is a class of cases in all of which a mental state of some nature is an ultimate fact. That kind of fact is impossible of proof except by the showing of an aggregate of circumstances, and the character of a party is often one of the most important means in the proof of such a fact. To meet this situation the courts have allowed the use of evidence of the character of the parties to a litigation. This exception finds illustration in various cases, civil and criminal, among which the reception of evidence of the character of a party in actions for malicious prosecution, to show that the defendant acted upon reasonable cause, and the contrary,[38] and in prosecutions for rape, to demonstrate the complainant's willingness,

[37] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 159, note 1.

[38] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 160, note 1.

and the contrary,[39] are prominent examples, the reasons for the exception being self-evident.

24. **Admissible evidence of character defined.**—When admissible evidence of the character of a party to a litigation is spoken of by lawyers, what is meant is evidence of the general reputation of the party in the community where he lives.[40]

25. **Character evidence, how presented.**—Evidence of character, when admissible, can be shown only by the testimony of witnesses who know what is the general reputation of the party in the community where he lives with respect to that trait of his character in question, as that trait was manifested before the fact to be shown by such evidence occurred. The individual opinions of the witnesses on the subject, although perhaps more cogent than their knowledge of that reputation, are inadmissible. "Suppose a witness is called who says that he knows nothing of the general character of the accused, but that he has had abundant opportunities of forming an individual opinion as to his honesty or the particular moral quality that may be in question. Surely, if such evidence were objected to, it would be inadmissible."[41] So, too, evidence of specific facts and circumstances, which have a tendency to establish the disposition of a party with respect to that trait of his character in question, since they show, not what a party's general reputation is, but

[39] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 339, note 2.

[40] Regina v. Rowton, Leigh & Cave, 520 (Eng.). See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 159, note 3.

[41] Per Cockburn, C. J., in Regina v. Rowton, supra.

what, perhaps, it ought to be, is inadmissible.[42] Likewise, rumors and suspicions, bearing on that trait of a party's character which is in dispute, do not constitute his general reputation concerning it, therefore evidence of them is inadmissible.[43]

26. **Matters not within the rule.**—Where the establishment of one of the ultimate facts in a case shows, incidentally, the disposition of a party to a litigation by proof of a specific act, the rule excluding evidence of character does not apply. For example, in an action to recover damages for an alleged slanderous or libellous statement accusing the plaintiff of the commission of a crime involving moral turpitude, to which the truth of the statement is pleaded as a defense, evidence of the commission by the plaintiff of the crime imputed to him is admissible, for, incidentally, it shows his bad disposition.

Again, in certain civil actions where the character of one of the parties is itself an ultimate fact, evidence of the general reputation of that party is not within the rule. For example, in an action to recover damages for an alleged slanderous or libellous statement, even though the truth of the statement is not pleaded as justification, it is competent for the defendant to show the plaintiff's bad reputation, to prove that the latter was not damaged by the statement, for that the plaintiff was damaged thereby is one of the ultimate facts in the case.[44]

[42] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 159, note 3.

[43] Scott v. Sampson, 8 Q. B. D. 491 (Eng.).

[44] Scott v. Sampson, supra. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 160, note 1. That the character of a witness in certain respects may be shown to impeach him, see § 166.

CHAPTER IV.

CONFESSIONS.

27. **Confessions—The rule stated.**—Direct acknowledgments of guilt by persons accused of crime are inadmissible, unless voluntarily made.

28. **Reason for the rule.**—A direct acknowledgment of guilt made by one accused of crime is called a confession. The history of the rule of the law of evidence, which renders inadmissible any but voluntary confessions, is but another phase of the old story of unwillingness to trust the jury. "The ground for not receiving such evidence is that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false, or that the law considers such statement cannot be relied upon;[45] but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury."[46]

29. **Confessions, when admissible.**—Confessions are admissible if they have been voluntarily made. The quality of spontaneity that brings a direct admission of criminal guilt within the exception to the rule against confessions, has, by repeated decisions, acquired a technical meaning. No confession is

[45] Although this is the reason generally given for the inadmissibility of involuntary confessions, 4 Blackstone's Commentaries (8th ed.), page 357.

[46] Per Pollock, C. B., in Regina v. Baldry, 2 Denison C. C. R. 430 (Eng.).

deemed to be voluntary if it appears to have been called forth by any threat, inducement, or promise made by one in charge of the conduct of the prosecution of the crime confessed, if such threat, inducement, or promise was made in reference to the prosecution of that crime.[47] Conversely, any confession not obtained in the foregoing manner is admissible.

30. **Typical cases.**—Accordingly, confessions procured to be made by one in charge of the conduct of the prosecution of the crime confessed by any inducement not held forth in reference to the prosecution of that crime;[48] or caused by inducements held out by one not in charge of the conduct of the prosecution of the crime confessed are voluntary.[49] If A, for example, should confess to a murder with which he is charged, in consequence of a promise by a prosecuting officer to allow him a bottle of whiskey if he did so, the confession would be voluntary, for the promise would not relate to the prosecution of the crime with which A is charged. So if B, accused of murder, should confess to her mistress, because of an inducement held out to her by the latter, the confession would be voluntary, for B's mistress would not have charge of the conduct of the prosecution of the crime with which B is charged.[50]

[47] Hopt v. Utah, 110 U. S. 574, 584. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 77, note 2.

[48] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 78, note 1; Roesel v. State, 62 N. J. L. 216, LEADING ILLUSTRATIVE CASES.

[49] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 79, note 3.

[50] Regina v. Moore, 2 Denison C. C. 522 (Eng.). Nor are confessions obtained by artifice for that reason alone inadmissible. Commonwealth v. Goodwin, 186 Pa. 218. There are statutory rules upon the subject in some jurisdictions. "A confession of a defendant, whether in the course of

31. **Confessions, how presented.**—Whether a confession has been voluntarily made or not is a question of fact for the court. In some jurisdictions the burden of showing it to have been voluntarily made is upon the prosecution; in others that it was voluntarily made is in the first instance presumed.[51] The whole confession must be presented. It is competent for an accused to explain or qualify his confession so as to shift back upon the prosecution the burden of going forward with evidence to establish his guilt by affirmative proof.[52] The weight to be given to a confession is, in connection with all other evidence in the case, for the jury.[53]

32. **Matters not within the rule.**—Evidence of facts learned through an inadmissible confession, at least when presented without aid from the confession, is not within the rule. For example: A is indicted for having received stolen property, knowing it to have been stolen. By promises of favor made in reference to the prosecution of the crime by those having it in charge, a full confession is obtained from A. Officers, acting on this information, find the property in a bed in A's lodgings. Evidence of the finding of the property and of the circumstances under which it was found is admissible.[54]

judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.'' New York Code of Criminal Procedure, § 395.

51 Stephen, Digest of Evidence (Chase's 2nd ed.), page 77, note 1.

52 Stephen, Digest of Evidence (Chase's 2nd ed.),.page 75, note 2.

53 See note 49, page 303.

54 The King v. Jane Warwickshall, 1 Leach C. C. 263 (Eng.). See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 80, note 4.

CHAPTER V.

HEARSAY.

33. **Hearsay—The rule stated.**—Oral or written statements when presented otherwise than by the testimony of the persons who made them, if offered to establish the existence of any fact asserted in such statements, cannot be shown except in certain cases.

34. **Reason for the rule.**—"If material witnesses happen to die before the trial, the person whose case they would have established may fail in the suit," said a famous English judge. "But although all the bishops on the bench should be ready to swear to what they heard the witnesses declare and add their own implicit belief of the truth of the declaration, the evidence would not be received."[55] Evidence of the character described in this rule, the inadmissibility of which is so trenchantly expressed in the quotation, is termed hearsay. Once again is the jury responsible for a rule of the law of evidence. Lack of confidence in that untrained body, as likely to assume the existence of facts asserted in a hearsay statement, because the author of the statement said so, without regarding how far the circumstances under which it was made may weaken or strengthen the probative force of the statement,

[55] Per Mansfield, C. J., in the Berkeley Peerage Case, 4 Camp. 414, 415 (Eng.).

begot the general prohibition against the admissibility of hearsay evidence.

35. **Matters not within the rule.**—The rule against hearsay evidence has no application to words used by a person, not a witness, when the mere speaking of those words is the only fact to be established. That is, the simple fact that a person, not a witness, made a written or oral statement may be established otherwise than by the testimony of that person. It is only when such a statement is sought to be presented otherwise than by the testimony of the person who made it, to show that the facts asserted in it exist, that the rule applies.

36. **Typical cases.**—"The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person."[56] Where, for example, in an action brought by A against B to recover damages for malicious prosecution for arson, X is called by B as a witness to testify that, before the complaint, X had been asked by two persons to tell B that they had seen A start the fire, and that X did so inform B, since X's evidence of the statement of the third persons is offered, not to prove that A started the fire, but to show upon what B based his complaint, as affecting the question of malice and probable cause, it is not within the rule.[57] Or where, for example, in an action brought by A against B to recover damages for the breach of an alleged oral contract, X, who was present when the alleged agreement was made,

[56] Per Parke, B., in Stobart v. Dryden, 1 M. & W. 615 (Eng.).

[57] Bacon v. Towne et al., 4 Cushing 217 (Mass.), LEADING ILLUSTRATIVE CASES.

is called by A as a witness to show the bargain between A and B, since X's evidence is not offered to establish the existence of any facts asserted in the statements of A and B, but merely to show what their conversation was as a matter of fact, it is not within the rule.[58] The present general reputation of a person may often be established as a substantive fact and, therefore, although it is based upon hearsay, evidence of it is not within the rule.[59]

37. **Exceptions to the rule.**—To the rule against hearsay evidence there always were qualifications and exceptions, some of which in reality are independent habits of receiving certain classes of evidence which antedate the rule and have survived in spite of it. The existence of others is justified by the difficulty which otherwise would attend proof of the facts which by them are permitted to be shown by hearsay evidence, and their consistency with the general rule against such evidence is made to depend upon circumstances warranting reliability to more than an ordinary degree.

38. **Hearsay evidence, how dealt with.**—Courts have a stock method of dealing with this kind of evidence. They ask first: Is the evidence hearsay? and second: Does it come within any of the exceptions to the rule against hearsay evidence? If the first question is answered affirmatively and the second in the negative, the evidence is excluded.[60]

[58] Blanchard v. Child, 7 Gray 155 (Mass.).

[59] See § 19 et seq. and § 97.

[60] "And clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible." Lord Blackburn, in Sturla v. Freccia, 5 App. Cas. 623 (Eng.).

CHAPTER VI.

EXCEPTIONS TO THE RULE AGAINST HEARSAY.

39. **Former testimony—The exception stated.**—The testimony of a witness on a former trial in relation to the same subject, between the same parties, or parties whose interests are practically identical, if such witness is dead, insane, physically unable to attend court, or is absent by procurement of a party, or will be without the jurisdiction for an uncertain time, or cannot be found, provided the party against whom such testimony was presented on the former trial had the right and opportunity then to cross-examine such witness, may be shown otherwise than by the testimony of such witness to establish the existence of facts asserted therein.

40. **The exception explained.**—The courts are generally agreed that death, insanity, physical inability to attend court, and absence by procurement of a party, are conditions which bring evidence of the testimony given by a witness on a former trial within the exception. To a large extent, also, the courts treat the permanent or indefinite absence from the jurisdiction of such a witness, or the inability to locate him, as producing the same effect in civil cases. Whether or not the absence of such a witness from the jurisdiction is sufficient to render evidence of such testimony admissible in criminal cases is a question upon which the courts are divided.

41. **Satisfaction of the exception.**—Upon proof of the death of a witness, without more, evidence of his testimony given on a former trial, subject always to the qualifications upon the exception, is admissible. Where any of the other circumstances stated in the exception is urged as the ground of the admissibility of evidence of the former testimony, the party presenting such evidence must first show the failure of diligent efforts to procure the attendance of the witness who gave that testimony. Whether or not the absence of the witness is sufficiently accounted for to permit a party to avail himself of the exception, is a question of fact for the court.

42. **Scope of the exception.**—The qualification upon the exception, that the proceeding in which evidence of the testimony of a witness given on a former trial is presented must be between the parties to the former trial, or parties whose interests are practically identical, is broader than its statement may indicate. It is not necessary that the parties hold the same positions occupied by them on the former trial, as plaintiffs and defendants; and privies in blood, in law and in estate of the parties to the former trial are parties whose interests are practically identical within the meaning of the qualification. By the qualification, that the party who did not present the testimony on the former trial must have had the right and opportunity then to cross-examine the witness, it is not meant that a cross-examination must have been had: if that party could then have cross-examined the witness had he so desired, this qualification is satisfied.

43. **Former testimony, how shown.**—What was the testimony given by a witness on a former trial may be shown, under the conditions and qualifications of the exception, by the testimony of anyone who heard and remembers all of it. This evidence must be of the substance of the words of the witness on the former trial, not of the substance of what that witness then said, and may be objected to upon any ground which could be raised against the testimony of the witness on the former trial, were the latter testifying. If the testimony on the former trial has been reduced to writing, the writing may be used to refresh the memory of the witness who made it, and, generally, it may not be employed for any other purpose.[61]

44. **Dying declarations—The exception stated.**—Oral or written statements made by a person dying and conscious of impending death, which account for his dying condition, may be shown in criminal homicide cases, in which the cause of the death of such a person is an ultimate fact, to establish the existence of facts asserted therein.

45. **Scope of the exception.**—Statements of the character described in the exception are called dying declarations. Unless all the circumstances stated in the exception exist, evidence of a statement made by a dying person is excluded by the rule against hearsay evidence. The declarant must have been about to die at the time the statement was made. He must have been in actual danger of imme-

[61] Upon the propositions stated in §§ 39-43, see the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 108, note 6; page 111, note 1.

diate death, but it is not required that he must have been "literally breathing his last."[62] He must have contemplated the immediate happening of his end.[63] If it appear that he entertained any expectation, or hope of recovery, however slight, evidence of his statement is inadmissible. Whether or not the declarant had abandoned all hope of recovery is a question of fact for the court. Yet the immediate sequence of the declarant's death upon the declaration is immaterial. If he believed himself to have been in a dying state when he made the statement, and that his death was near at hand, he may live for weeks,[64] or months,[65] thereafter, and evidence of the declaration be admissible.

46. **Same subject.**—The declaration must account for the dying condition of the declarant. It must explain why he was about to die, or give the facts responsible for his dying condition. Evidence of a declaration expressing the opinion of the declarant in that respect is inadmissible.[66] Evidence of such a declaration is inadmissible in civil cases.[67] In criminal cases it is admissible only when the crime charged is a homicide.[68] And then it is admissible

[62] Commonwealth v. Haney, 127 Mass. 455.

[63] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 87, note 2; Mattox v. United States, 146 U. S. 140, LEADING ILLUSTRATIVE CASES.

[64] Titus v. State, 117 Ala. 16.

[65] State v. Craine, 120 N. C. 601.

[66] People v. Shaw, 63 N. Y. 36, 40.

[67] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 87, note 1.

[68] People v. Davis, 56 N. Y. 95. In some jurisdictions evidence of dying declarations of the victims of abortions is admissible. This extension of the exception in most cases has been accomplished by statute. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 90, note 2.

only when the cause of the death of the declarant is the subject of the criminal charge.[69] Where, however, several persons have died as the result of a single criminal act, evidence of such a declaration by any of them is admissible on the trial of a criminal homicide in which the cause of the death of any of the others is under investigation.[70] Evidence of such declarations, when admissible, is received in favor of, as well as against, an accused.[71] If the declarant's testimony under oath would have been inadmissible, evidence of the declaration is inadmissible.[72] The credibility of such declaration may be impeached in the same manner as the testimony of the declarant could have been.[73]

47. **Declarations in questions of pedigree—The exception stated.**—Oral or written statements concerning relationship, birth, death or marriage, and the time and place of birth, death or marriage, made by a deceased person, who was related by blood or marriage to the family which is the subject of such a statement, may be shown in cases involving a disputed claim of legitimacy, if such statements were made before such claim was disputed, to establish the existence of facts asserted therein.

48. **The exception explained.**—Statements of the character described in the exception are termed dec-

[69] People v. Davis, 56 N. Y. 95.

[70] Rex v. Baker, 2 Moody & R. 53 (Eng.).

[71] People v. Southern, 120 Cal. 645.

[72] The King v. Drummond, 1 Leach C. C. 337 (Eng.).

[73] Thayer, Cases on Evidence, page 355, note 1. The constitutional provision securing to an accused the right to be confronted with witnesses against him does not render evidence of dying declarations inadmissible. Thayer, Cases on Evidence, page 370, note 2.

larations in questions of pedigree. Every question of pedigree is a question of legitimate relationship.[74] "Where a relationship is acknowledged as a matter of fact, and its lawfulness only is disputed, hearsay from members of the family may be introduced to show that such relationship is lawful or is not lawful. But hearsay cannot be introduced to establish an unlawful relationship per se where a lawful relationship is not claimed."[75]

Strictly speaking, the facts of birth, death and marriage, or of the time and place at which any of these events occurred, present no question of pedigree. Hearsay evidence of these facts is within the pedigree exception because it may be the basis for these events occurred, present no question of pedigree, i. e., a question of legitimate relationship, may be solved.[76]

49. **Scope of the exception.**—All the conditions stated in the exception must be satisfied or evidence of such a declaration is excluded by the general rule against hearsay evidence. The declarant must be dead. The declarant must have been related by blood or marriage to the family which is the subject of the declaration; in other words, to the family with which the person whose pedigree is disputed seeks to show himself to be legitimately related. No limit seems to have been fixed by the cases as to the

[74] Crispin v. Doglioni, 3 Sw. & Tr. 44 (Eng.).

[75] Flora v. Anderson, 75 Fed. Rep. 217, 234. Contra, Northrop v. Hale, 76 Me. 306.

[76] Thayer, Cases on Evidence (2nd ed.), page 405, note 3. The place of birth generally is not allowed so to be shown in this country. See cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 104, note 1.

degree of blood relationship of the declarant to the family which is the subject of such a declaration, but it is settled that only the husband or wife of one related by blood to the family which is the subject of such a declaration is related to such family by marriage within the meaning of the pedigree exception. The fact of the relationship of the declarant in either of these respects must be established otherwise than by evidence of the declaration.[77]

Nor is evidence of such a declaration admissible, unless, as the cases put it, the declaration was made ante litem motam. This means that the declaration must have been made before the beginning of the controversy over the question of legitimate relationship; not that it is sufficient if it were made before the beginning of the proceeding in which the question is litigated. There is some authority for the proposition that evidence of such a declaration is inadmissible unless the question of pedigree disputed is one of the ultimate facts in a case. By the better view it is enough that a question of pedigree is involved in the case, i. e., evidence of such a declaration is admissible if a question of pedigree is either an evidential or ultimate fact in a case.[78]

50. **Declarations as to matters of public or general interest—The exception stated.**—Oral or written statements concerning the general reputation of matters of public or general interest which were made by a deceased person before such matters were

[77] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 105, note 2.

[78] Inhabitants of North Brookfield v. Inhabitants of Warren, 16 Gray 171 (Mass.).

disputed may be shown to establish the existence of facts asserted therein.

51. **The exception explained.**—Statements of the character described in the exception are termed declarations as to matters of public or general interest. These may be not only the assertions of individuals, but may also take on the form of maps, surveys, deeds and leases.

52. **Public or general interest defined.**—"The term 'interest' here does not mean that which is interesting from gratifying curiosity, or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights are affected."[79] The case from which the definition is quoted affords an excellent illustration of it. That was an indictment against the inhabitants of a county for allowing a bridge to be out of repair, to which it was pleaded that certain persons ought to repair the bridge by reason of their tenure of certain manors. In support of the plea, a witness was called who testified that he, and his deceased father before him, had worked in repairing a part of the bridge. He was then asked whether he had heard from his deceased father who ought to repair that part of the bridge on which they had worked. The answer called for by that question was within the exception, for, if it was the duty of the county to repair the bridge, all the inhabitants would be taxed for that object and had, therefore, a pecuniary interest in the matter. Moreover, that class of the community

[79] Queen v. Bedfordshire, 4 E. & B. 535 (Eng.).

which used the bridge had a public interest in its maintenance in a proper state of repair.

53. **Public interest and general interest distinguished.**—A matter is often said to be of public interest if all the people have a pecuniary or legal interest in it, and matters in which a single community, or a large class thereof, have a pecuniary or legal interest are often said to be matters of general interest as opposed to those of public interest. The effect of this distinction is said to be that evidence of a declaration, having the attributes stated in the exception, is admissible when such declaration was made by any member of the public, if the matter is one of public interest; while in matters of general interest, before evidence of such a declaration is admissible, it must appear that the declarant belongs to that class of persons who are naturally likely to have accurate information in reference to the matter, and, consequently, are so situated that their statements in that regard are satisfactory evidence of reputation concerning such matter.[80] Only in clear cases can such a discrimination between matters of public interest and matters of general interest be of value. In every close case it must be determined that the matter is by its nature one that so interests the community, in a legal or pecuniary way, that it must have provoked a discussion sufficiently intelligent and lasting to result in a reputation concerning such matter that may be relied upon.[81]

[80] Stephen's Digest of Evidence (Chase's 2nd ed.), Art. 30.

[81] The subject is so dealt with in Queen v. Bedfordshire, 4 E. & B. 535.

54. **Scope of the exception.**—The declarant must be dead. The declaration must have been made ante litem motam. Here this phrase means that the declaration must have been made before the beginning of the controversy over the matter of public or general interest; that it was made before the proceeding in which the matter is litigated was brought, will not do.

The subject of such a declaration must be the reputation of matters of public or general interest, and not particular facts, from which an inference may be drawn in respect to such matters. Thus in Hall v. Mayo[82] a question as to the location of a certain house arose and it was proposed to be shown that a person, since that time deceased, had declared where the house had stood. The evidence was declared inadmissible. From this it is not to be understood that there is a limitation upon the exception by which evidence of these declarations is not admissible to establish the reputation of particular facts of public or general interest. In the same case it was proposed to ask the same witness if there was any tradition in his family as to where the house in question had stood. The evidence called for by the latter question was not open to the objection that the subject of it was a particular fact and not the reputation of the matter inquired about. It was excluded, however, on the ground that the location of a private boundary, to establish which the location of the house in question was attempted to be shown, was not a matter of public or general

[82] 97 Mass. 416.

interest within the meaning of the exception. On that point the great weight of American authority is to the contrary.

55. **Private boundaries as matters of public or general interest.**—The American courts, in a class of cases in which questions as to the location of boundaries are involved, have attached no great significance to the element of public or general interest in the matter which may be shown by evidence of these declarations. "By them (the American cases) it is clear that the declarations on a question of boundary of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, and whether the boundary be one of general or public interest, or be one between the estates of private proprietors."[83] In England, the boundary must be one in which there is a public or general interest, or evidence of these declarations, to show its location, is inadmissible,[84] unless a private boundary is identical with one of public or general interest.[85] A similar rule obtains in a few American jurisdictions.[86]

56. **Public documents—The exception stated.**—Records kept for public inspection by a public officer in the discharge of his official duty are themselves admissible to establish the existence of facts asserted therein.

57. **Public document defined.**—"It should be a

[83] Morton v. Folger et al., 15 Cal. 275.
[84] Regina v. Berger (1894), 1 Q. B. 823 (Eng.).
[85] Thomas v. Jenkins, 6 A. & E. 525 (Eng.).
[86] See Thayer, Cases on Evidence (2nd ed.), page 422, note 1.

public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is 'public' in the sense that it concerns all people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned would be 'public' within that sense. But it must be a public document, and it must be made by a public officer."[87]

58. **Typical cases.**—Where, for example, upon the trial of an action to recover damages for injuries alleged to have been caused by negligence, it became material to show the direction and velocity of the wind and the falling of snow at particular times, the records of the weather, kept for the locality where the alleged tort occurred, by officers of the United States Signal Service, were admitted to show those facts.[88] But, where the record of baptisms in a Catholic Church, regularly kept for a series of years by its priest, was offered to disprove a defense of infancy, it was not within the exception, because it had not been kept by a public official, pursuant to his duty, and for public inspection.[89]

59. **Other considerations.**—To impart this public character to documents, it is not necessary that a statute requires them to be kept. "It is sufficient that they are kept in the discharge of a public duty.

[87] Per Lord Blackburn, in Sturla v. Freccia et al., 5 App. Cas. 623 (Eng.). See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 113, note 1.

[88] Evanston v. Gunn, 99 U. S. 660, LEADING ILLUSTRATIVE CASES.

[89] Kennedy v. Doyle, 10 Allen 161 (Mass.).

Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him."[90]

60. **Ancient documents.**—An ancient document is one not less than thirty years old at the time of the proceeding upon which it is offered in evidence. Such an instrument, it is said, "proves itself." What is meant is that proof is not required of the execution of such a document. That is to say, a document which is not less than thirty years old at the time of a proceeding upon which it is offered in evidence, need not be shown to have been signed, sealed (where that is necessary) or delivered, nor need a subscribing witness thereto be called. This is not saying that such a document is admissible. Whether it is admissible or not depends, in all cases, upon that which it is offered to prove.

61. **Ancient possession—The exception stated.** A document of ownership of land executed beyond living memory, when produced from proper custody, is itself admissible to establish that the person who executed such document had possession of the land affected thereby at the time such document was executed.

62. **Different meanings of the term "ancient."** —An important distinction between different meanings of the term "ancient" is here to be noted. An ancient document, technically so called, is one not less than thirty years old at the time of the proceeding upon which it is offered in evidence, and the only effect of its ancientness is that proof of its

[90] Evanston v. Gunn, 99 U. S. 660. See also § 56 et seq.

execution may be omitted. Ancient possession, on the other hand, is possession that goes back beyond the average memory of living men. Thus documents of ownership of land, e. g., deeds, leases, and licenses, are old enough, when executed beyond living memory, to be evidence that the makers of them had possession of the land they purport to affect at the time they were executed. Just what degree of ancientness removes the hearsay rule's denial of admissibility to documents when offered as evidence of ancient possession, is a matter defined only by the cases,[91] where other limitations upon this exception to the hearsay rule are also prescribed.

63. **Typical cases.**—In Clarkson v. Woodhouse et al.,[92] the defendant pleaded in justification to trespass, among other things, a right to common of pasture in the premises in question. The replication alleged a custom to appropriate the land, and was traversed. To establish this custom the plaintiff introduced leases of the premises which were 71 and 123 years old. "These old leases were proper evidence to show that, at that time, the lord of the manor did in fact demise the ground." And in Bristow v. Cormican,[93] where a lease executed in 1660 was introduced, it was said: "Now the indenture of 1660 purporting to make a lease of this property, and the payment of rent (though only for one year), so long ago as 1660, are admissible evidence to show that there was actually possession by

[91] These are collected in Thayer, Cases on Evidence (2nd ed.), chapter II, § IV, subd. *f*.

[92] 3 Doug. 189 (Eng.).

[93] 3 App. Cas. 668 (Eng.).

(the lessee) Sir John Clotworthy at that time. If the date of the indenture and the payment of rent had been a few years ago, they would not have been admissible evidence, for then it would have been possible and right to call witnesses to prove that possession was actually had."[94]

64. **Proper custody defined.**—The ancientness of a land document, then, first determines its admissibility for the purpose of establishing ancient possession of the land it purports to affect. But the document must also appear to have come from proper custody, that is, from a place where it would naturally be expected to be found or it is inadmissible. Thus the ledger book of an abbey, taken from the muniment room of a marquis who owned lands formerly belonging to the abbey, came from proper custody.[95]

65. **Ancient possession, how shown.**—A sufficiently ancient land document produced from proper custody is merely evidence of ancient possession of the land it purports to affect. Its weight is for the tribunal which receives it, and while evidence of possession, payment of rent, and other acts of ownership under the document is not essential to the admissibility of the document, nevertheless the presentation, or failure to present such evidence, bears strongly upon the worth of the document. Thus in City of Boston v. Richardson,[96] the plaintiff sought to recover certain land, title to which it claimed to

[94] Per Lord Blackburn, quoted in Thayer, Cases on Evidence (2nd ed.), page 455, note 1.

[95] Bullen v. Michel, 4 Dow. 297 (Eng.).

[96] 105 Mass. 351.

have acquired by adverse possession, and showed that a fish box had stood on the land in question from 1808 to 1824, when the plaintiff had removed it and erected an engine house there. The plaintiff then offered to present the record of two orders of the selectmen of the town of Boston in 1761 granting, to one Blake, liberty to set up a fish house on the premises, and permission to one Stevens to occupy a fish stall there. It was held that a sufficient case had been made out by such documents, plus the acts of ownership that had been performed under them, to entitle the plaintiff to go to the jury on the question of adverse possession.[97]

66. **Entries and declarations against interest—The exception stated.**—Oral or written statements of a deceased person against his own pecuniary or proprietary interest, and statements incorporated with such statements against such interest, may be shown to establish the existence of facts asserted therein.

67. **Declarations against interest and admissions distinguished.**—Evidence of statements having the attributes set forth in the exception, escapes the operation of the rule against hearsay evidence, on the broad principle that such statements are made in prejudice of the party making them.[98] In this respect these entries and declarations are similar to admissions,[99] but care should be taken to distinguish

[97] Ancient plans, which have been made use of, are in some jurisdictions held to be within the exception. Whitman v. Shaw, 166 Mass. 451.

[98] See the remarks of Lord Ellenborough in Highan v. Ridgway, 10 East 109 (Eng.).

[99] See § 181 et seq.

between the two. An admission is always the statement or conduct of one of the parties to a legal proceeding, or of someone legally identified in interest with such a party; a declaration, or entry against interest, is always made by a third party. Moreover, an admission is not inadmissible because the party who made it is living, while evidence of a declaration or entry against interest is inadmissible unless the person who made the declaration or entry is dead; although, as soon as the evidence of a declaration or entry against interest satisfies the conditions of the exception, it is immaterial that the existence of the facts asserted in the declaration or entry can be proved by a living witness.[1] Again, the term "admission" includes a large class of statements which are not declarations against the pecuniary or proprietary interest of the party making them as, for example, the statement of one on trial for murder, that a bloody knife found near the corpse of the murdered man is his (the prisoner's) property; while this is good against the latter as an admission, it could never be a declaration against his interest, because it does not operate against his pecuniary or proprietary interest.

68. **Scope of the exception.**—The declaration or entry must have a plain tendency to charge the declarant or maker with the payment of money, or to discharge another from the payment of money to the declarant or maker; or to cut down the declarant's or maker's title to property. It must, more-

[1] See the remarks of Parke, B., in Middleton v. Melton, 10 B. & C. 317 (Eng.).

over, be clearly, directly, and necessarily against his pecuniary or proprietary interest, and not remotely, contingently, or possibly against it. Thus the statement: "I enclose * * * draft of John Blakey which he sent to-day, with three huge casks to the office," imports that the maker is liable should the casks mentioned in it be lost, but such liability "is an interest of too remote a nature to make the statement admissible in evidence."[2]

69. **Statements incorporated with declarations against interest.**—A statement incorporated with a declaration or entry against interest, may be shown under the exception to establish the existence of facts asserted in it, even where the declaration or entry is not material, provided the incorporated statement is material. This was decided in the leading case upon the subject of declarations and entries against interest.[3] Lord Ellenborough there stated the question to be, "Whether the books of a man mid-wife, attending upon a woman at the time of her delivery, and making charges for such his attendance, which he thereby acknowledges to have been

[2] Smith et al. v. Blakey, L. R. 2 Q. B. 326 (Eng.).

[3] Highan v. Ridgway, 10 East 109. There is a tendency to heap up qualifications upon this exception to the rule against hearsay evidence. In County of Mahaska v. Ingalls, 16 Ia. 81, Dillon, J., says: "3rd. The declaration must be of a fact or facts in relation to a matter concerning which the declarant was immediately and personally cognizable. 4th. In addition, the court should, upon the circumstances of the particular case, be satisfied that there was no probable motive to falsify the fact declared, as where the declaration is made ante litem motam, or at a period so remote as to preclude all suspicion that it was manufactured for the occasion." These qualifications upon the exception do not find support in the authorities. See in this connection Thayer, Cases on Evidence (2nd ed.), page 507, note 1.

paid, are evidence of the time of the birth of the son, as noted in those entries?" It was held that the entries could be shown for that purpose. The principle was strikingly applied again in Davies v. John Humphreys.[4] That was an action by one of three makers of a joint and several promissory note for 300 pounds, who had paid the note, against another of the makers of it, to recover a moiety of what the plaintiff had paid the payee, on the theory that the defendant was a co-surety. To show the defendant to be a co-surety, the plaintiff offered a receipt indorsed on the back of the note by which the payee (since that time deceased) acknowledged the payment by the plaintiff of 280 pounds on account of the 300 pounds, "the 300 pounds having originally been advanced to Evan Humphreys." (Evan Humphreys was the third maker of the note.) The whole entry was admitted, because the acknowledgment of payment was against the pecuniary interest of the deceased, and this acknowledgment of payment made the incorporated entry likewise admissible.

70. **Account books of parties to the litigation—The exception stated.**—The regularly kept account books of parties to a litigation, covering transactions involving small amounts of money usually charged on such books at about the time such transactions occur, are themselves admissible to establish the existence of facts asserted therein.

71. **Reason for the exception.**—The practice of using the account books of parties to a litigation, as evidence of facts entered on them, is older than

[4] 6 M. & W. 153 (Eng.).

the law of evidence. It was recognized as early as 1609, when there was enacted in England a statute forbidding the use of these shop books as evidence in actions between tradesmen and citizen customers after the expiration of a year from the time the goods or work charged thereon had been delivered or performed.[5]

In the American colonies similar statutes were passed regulating the use of shop books as evidence and differing from the statute which had preceded them in England only in the omission of a time limitation upon the competency of the shop books. The use of these books as evidence in this country was "grounded on the necessity of the thing."[6] At the time the practice originated the parties to a legal proceeding were disqualified from testifying on the ground that they were interested witnesses, and account books were generally the only available evidence of transactions customarily charged on such books.

72. **No general American rule.**—Some of the American statutes on this subject have fallen into disuse, but in all these instances judicial decisions have kept alive this exception to the hearsay rule. In other jurisdictions in this country the exception has been extended and perpetuated by consecutive legislation. The result is that the use of shop books as evidence is qualified and limited in so many varying ways that a general American rule upon the subject cannot be stated.

[5] 7 Jac. 1, C. 12. See Thayer, Cases on Evidence (2nd ed.), page 507.
[6] Swift, Evidence, § 81.

73. **Scope of the exception.**—The rules governing all writings require that the original shop book must be produced when such books are to be used as evidence, but where entries have been transferred to an account book from memoranda not intended to be permanent, they are still considered original. Thus, charges entered by a blacksmith on a slate, transcribed into an account book, and then rubbed off the slate, were held to be original.[7] The form of an account book is unimportant, but it must be a regularly and not casually kept record of a course of dealing between the party who made the entries and his customer. More than a single charge against the customer must have been entered; otherwise there has existed no course of dealing between the party and his customer which could have been regularly recorded.[8]

The entries must, of course, be of transactions usually charged on account books. Only those books upon which accounts are kept in the usual course of the conduct of a small business concerning transactions relating to the sale and delivery of goods, the performance of services, and the hired use of things to be returned, are evidence of facts recorded on them within the strict letter of the common law definition of the exception,[9] and then only if the amounts involved are small.

74. **Same subject.**—Entries of cash transactions

[7] Faxon v. Hollis, 13 Mass. 427.

[8] Vosburgh v. Thayer, 12 Johns. 461 (N. Y.).

[9] The exception in some American jurisdictions has been extended to cover the account books of professional men. Best, Evidence (Chamberlayne's ed.), page 482, note 1 (e).

cannot be proved by a book of account.[10] Since transactions in which money of considerable amount is involved are not proper subjects of book account, such books are not competent to show such transactions. There seems to be no definite judicial attitude as to any maximum amount of money fixed by this limitation upon the exception. It may be said generally that, if the amount involved in the transaction is so large that there must have been other evidence of the transaction, a party's shop book is inadmissible to show the facts of that transaction. The entries must have been made contemporaneously with the transaction to which they relate. This qualification must be affected in all cases by the nature of the business transacted. The entries need not be made simultaneously with the transaction they record. It is enough that an entry be made within a reasonable time after the transaction recorded has occurred. What is a reasonable time for that purpose is, in all cases, a preliminary question of fact to be decided by the court in passing upon the admissibility of a shop book.[11]

75. **Account books, how proved.**—There is little uniformity in the rules prescribing in the different jurisdictions what is required preliminary to the receipt of a party's account books in evidence. In New York, for example, such books are inadmissible unless a foundation for their admission first is laid by proof that the party who offers them had

[10] Smith v. Rentz, 131 N. Y. 169. See the authorities contra cited Thayer, Cases on Evidence (2nd ed.), page 528, note 2.

[11] The court may exclude account books entirely where their appearance is suspicious. Pratt v. White, 132 Mass. 477, LEADING ILLUSTRATIVE CASES.

no clerk, that some of the articles charged were delivered, or some of the services charged performed, that the books produced are the account books of the party, and, by persons who have dealt and settled with the party on the strength of such books, that he keeps fair and honest accounts.[12]

76. **The suppletory oath.**—At common law in most jurisdictions, where a party kept his own books of account, since the books produced could not be shown to be the books of the party without his testimony, the party, although an incompetent witness (or, if the party was dead, his personal representative), was allowed to identify them and verify their correctness by what was called a suppletory oath.[13] A suppletory oath for such a purpose is not testimony, within the meaning of the statutes, disqualifying a person as a witness to a transaction or communication with one deceased.[14] Nor, when the personal representative of a deceased party makes use of the latter's books of account under a suppletory oath, does he "open the door" to his incompetent opponent under these statutes. Books of account, however, are regarded as primary evidence, and the oath of the party, or of his personal representative, by which they are identified and shown to be correct, is regarded as something supplementary.

77. **Present utility of the exception.**—Since parties to a litigation to-day are generally competent

[12] Vosburgh v. Thayer, 12 Johns. 461 (N. Y.).

[13] Such an oath is not required in New York. Conklin v. Stamler, 8 Abb. Pr. 395 (N. Y.).

[14] Sheehan v. Hennessey, 65 N. H. 101.

witnesses, "the necessity of the thing" upon which the exception is grounded has vanished. A party may now use his account books to refresh his recollection as to entries upon them, or, if he has completely forgotten the facts he reported, he may testify that the entries were correctly made and that he believes them to be correct and the account book itself is then nearly everywhere admissible. In either of these events the entries are supported by the party as a witness, and, therefore, are not hearsay. The foregoing is the manner in which, when unhampered by statutes regulating the use of the account books of parties, the courts have treated such books. In any event a party may elect to use his account books to refresh his recollection as to the entries upon them, and, since for this purpose it is immaterial whether the book is properly one of account or not, the necessity of satisfying the limitations upon the exception is obviated. The great disadvantage attending the use of account books under the exception, as contrasted with the use of them to refresh a party's recollection as a witness to the transactions there recorded, renders the exception no longer important.[15]

78. **Entries and declarations of third parties made in the regular course of duty or business—The exception stated.**—Written statements, if made by third persons in the regular course of duty or business at about the time the transactions to which such statements relate occurred, when such persons are dead or otherwise unavailable as witnesses, are

[15] Wigmore, Evidence, § 1560, and the cases cited.

themselves admissible to establish the existence of facts asserted therein.

79. **The exception distinguished from that in favor of account books.**—This exception to the hearsay rule probably originated as an extension of that in favor of account books of parties. At least, these exceptions are of common origin and it should be noticed wherein they are dissimilar. The former exception covers only entries made in a shop book of a party to a litigation; the latter exception removes, from the operation of the hearsay rule, entries made by third persons upon all manner of writings.

80. **Scope of the exception.**—To come within the exception a statement must be in writing. In England upon the trial of an indictment for the murder of a police officer, it was held that the dead officer's oral report to his superior on the night the former was killed, that he was going to watch the accused, was a declaration made in the course of duty and, therefore, could be shown.[16] Oral declarations made in the course of business or duty cannot be shown under the exception in this country.[17] The refusal of the American courts to extend the exception to such oral declarations is probably to be accounted for by the absence, in this country, of a limitation upon the exception always incorporated into a statement of it in England, namely, that the entrant or declarant must have been under a duty to make the entry or declaration.[18]

[16] Regina v. Buckley, 13 Cov. C. C. 293 (Eng.).

[17] See Thayer, Cases on Evidence (2nd ed.), page 587, note.

[18] Chambers v. Bernasconi, 1 Cr. M. & R. 347 (Eng.).

81. **Same subject.**—The entries must have been made in the regular course of duty or business. Entries are made in the regular course of business when they are made as a matter of routine. That is, they must be made regularly and not intermittently. The word "business" here imports no qualification as to the character of the vocation which must have been pursued by the entrant. "An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney, or solicitor, or a physician in the course of his secular occupation."[19] The entries must have been made at about the time the transactions to which they relate occurred. Whether or not an entry was made reasonably contemporaneously with the transaction it records is a question of fact for the court to decide upon the facts of a particular case.

The entrant must be dead or otherwise unavailable as a witness. The death of the entrant is everywhere sufficient to bring an entry within the exception, if the other conditions are met. The same also is pretty generally true of the fact that the entrant is without the jurisdiction, and in some jurisdictions the insanity of the entrant, or his physical inability to attend court, has that effect.[20]

82. **Entries made in the regular course of business, how proved.**—Where the entrant is dead or unavailable as a witness for any reason sufficient to answer the condition of the exception in that re-

[19] Per Gray, J., in Kennedy v. Doyle, 10 Allen 161 (Mass.).
[20] Thayer, Cases on Evidence (2nd ed.), page 575, note 1.

spect, since as a witness he could speak only of facts within his personal knowledge, it must be made to appear that he personally knew the facts recorded by him. If he has entered facts furnished him by another, of which he had not personal knowledge, it is necessary that the person by whom the facts were thus supplied to the entrant first swear to the correctness of the oral or written report made by him to the latter. So under the rule stated in the following paragraph an oral or written report, made in the regular course of business or duty, and taken down by another in the regular course of business or duty, is within the exception, when supported by the oaths of the reporter and the writer.[21] The handwriting of the entrant must, of course, be identified.

83. **An extension of the exception.**—"But the American cases appear to establish another principle, which is derived directly out of the former, and is in fact but a more extended application of it, viz., that where original entries have been made in the usual course of business and are authenticated as such by the oath of the person who made them, though he remembers and can testify nothing about the facts recorded in the entries, such entries thus verified by the oath of the person who made them, are admissible primary evidence of those facts during his life. * * * The cases involving this principle are to be distinguished from those which turn upon a witness's being allowed to refresh his

[21] The Mayor, etc., of New York v. The Second Avenue Railroad Company, 102 N. Y. 572, LEADING ILLUSTRATIVE CASES.

memory by referring to memoranda or entries."[22] The reasoning by which the exception came thus to be extended is not that usually employed in dealing with an exception to the hearsay rule. It was argued, that if an entry in the regular course of business is admissible after the death of the entrant upon proof of his handwriting, a fortiori it is admissible when backed up by his oath if he is alive.[23] The result is that only such entries as would have been admissible were the entrant dead, upon proof of his handwriting, are admissible when authenticated by his oath in his lifetime.[24]

84. **Declarations bearing upon the physical or mental condition of the declarant or upon his intention—The exception stated.**—Statements made by a person, descriptive of his mental or physical condition, may under certain circumstances be shown otherwise than by his testimony to establish the existence of facts asserted therein.

85. **Reason for the exception.**—This exception to the hearsay rule began in necessity. It was only by means of statements descriptive of them that the existence of sensations which manifest no extrinsic symptoms could be shown when the sensation had

[22] See the American note to Price v. Torrington, 1 Smith's Leading Cases (8th ed.), 572-573, quoted in Thayer, Cases on Evidence (2nd ed.), page 575, note 1.

[23] Shove v. Wiley, 18 Pickering 558 (Mass.).

[24] Except in New York, where casual entries are not inadmissible. Guy v. Mead, 22 N. Y. 462. But a casual entry, or any other, is inadmissible in New York, unless its character is such that the witness who made it will be permitted to refresh his memory from it or swear to its correctness. Where an entry is copied by a third party at a time after the occurrence of the transaction recorded the copy is inadmissible. Peck v. Valentine, 94 N. Y. 569.

been experienced by a party who was incompetent as a witness. Statutes rendering parties competent witnesses in their own behalf have been survived by the exception, and the exception is now justified by the argument that statements of the character covered by it are, perhaps, more trustworthy evidence of the condition they describe than the later testimony of the person who made them would be when his recollection was no longer fresh.

86. **Statements descriptive of present mental or physical distress.**—A class of statements so often proved under the exception comprehends those descriptive of present mental and physical distress. In this connection, several matters which are frequently confused should be kept apart.

Groans, grunts, and sighs. Evidence of groans, grunts, and sighs, and other spontaneous exclamations which ordinarily accompany pain is admissible because such exclamations are deemed verbal acts and are received as substantive facts tending to prove the existence of pain. They are the natural language of pain.

Narrative of a past fact. Evidence of the narrative of a past fact, to establish the existence of that fact, is inadmissible. Thus, on the trial of an action to recover damages for personal injuries, the testimony of a physician, "that the plaintiff complained of extreme pain in the leg; and said he had been struck by a horse, some number of months before, four or five months before, on that leg," was held inadmissible.[25]

[25] Chapin v. Marlborough, 9 Gray 244 (Mass.).

Made to an ordinary witness. Evidence of statements descriptive of present mental or physical distress of the declarant, made to an ordinary witness, is generally inadmissible. The case which is the source of all modern authority on this point enunciated a contrary rule. That was an action on a policy of life insurance, to which was pleaded the breach of a warranty that the insured was in good health when the policy was issued. A statement made by the insured shortly after her application for the policy had been made "That she was poorly when she went to Manchester and not fit to go. Then it would be ten days before the policy would be returned and she was afraid she would not live till it was made and then her husband could not get the money," was allowed to be shown by an ordinary witness to whom it was made.[26] The decision is not well reasoned and it is doubtful if it would now be followed outside its own peculiar facts.

Made to a physician. Similar statements made to a physician for purposes of medical treatment cannot be shown to establish the existence of facts therein asserted except where the physician, to whom such a statement was made, is called to express an opinion based in part upon such statements, when evidence of them may be received from him to afford a tribunal the means for determining to what extent the declarations justify the opinion.[27] But under the rule excluding evidence of matters likely to mislead the jury, or to be misused by it, the

[26] Aveson v. Lord Kinnaird and others, 6 East 188 (Eng.).

[27] Williams v. Great Northern R. R. Company, 68 Minn. 55, LEADING ILLUSTRATIVE CASES.

court may, in its discretion, exclude evidence of the declarations upon which the physician bases his opinion and direct him to state merely his opinion based on what was stated to him.

87. **Statements as to intention.**—Intention is a mental condition and evidence of statements made by a person bearing upon his intention is admissible, under the exception, from third persons to whom such statements were made, when the intention of the declarant is material. Thus, where it was material to be shown that A had left W with the present intention not to return, evidence of statements made by A to persons in C, where he had gone after leaving W, inquiring how he could acquire a residence in C, and of what he had said to those persons at that time, was properly received. But statements of this kind are self-serving and evidence of them is excluded unless it is corroborated by proof of acts which accompany and explain them, and which are independently competent to be shown. In the case put by way of illustration, corroboration was supplied by proof that A had moved to C.[28]

88. **Typical cases.**—There is a variety of similar situations where hearsay evidence has been admitted to show intention as one fact in a chain of circumstances which establish an ultimate fact. In an action of trespass for the destruction of a picture publicly exhibited by the plaintiff, an artist, the defendant, upon the question of damages, in order to show that the picture was a libel on his sister

[28] Viles v. Waltham, 157 Mass. 542. Evidence of a similar statement of intention was received without corroboration in Mutual Life Insurance Company v. Hillmon, 145 U. S. 285.

and brother-in-law, introduced evidence of the declarations of spectators made while they viewed the picture, and the evidence was received to show that the picture had produced upon the minds of the spectators the mental effect of resemblance to the defendant's sister and her husband.[29] Also in an action to recover damages for injuries alleged to have been caused by a falling tree, around which excavations had been made while a street was being paved, evidence of what was said by spectators, as they looked at the exposed roots of the tree, was received to show that the condition of the tree had produced upon them the mental effect of knowledge of the unsafe condition of the spot, and thus tended to show that the defendant had notice of such condition.[30] Upon the trial of an indictment for murder, a trance medium was allowed to testify that the woman alleged to have been murdered called upon the witness the day before the alleged crime was committed, and during an interview had said that she was five months' pregnant and was going to drown herself.[31] Here, since the declaration was not self-serving, it was not required that it be corroborated by some other act admissible in the case.[32]

89. **Statements of the testamentary intention.**— Whenever evidence of declarations of a testator is offered the first pertinent question is, For what purpose? There may be several answers: (1) To show

[29] Du Bost v. Beresford, 2 Camp. 511 (Eng.). These declarations would also seem to be part of the res gesta of the publication of the libel and admissible for that reason. See § 90 et seq.

[30] Chase v. Lowell, 151 Mass. 422.

[31] Commonwealth v. Trefethen, 157 Mass. 180.

[32] Cf. Viles v. Waltham, 157 Mass. 542.

the execution by the testator of a will. (2) To impeach a will for fraud, duress, undue influence, or for mental incapacity of the testator. (3) To establish the contents of a lost will.

To show the execution of a will. Evidence of statements made by a testator is not admissible to show the execution by him of a will. The reason is that the evidence is hearsay and cannot be brought within any of the exceptions to the rule excluding hearsay evidence.[33]

To show mental condition of a testator. Under the present exception to the hearsay rule, evidence of statements by a testator, made either before or after the execution of a will, is admissible to show the condition of his mind at the time the testamentary act was performed. That the mental condition of a testator is in issue when his incapacity to execute a will is asserted is clear. The same fact may be in issue where fraud, duress, or undue influence is the ground upon which a will is contested. In the latter event evidence of the declarations of a testator, whether made before or after the will was executed, is not received to establish either fraud, duress, or undue influence as a substantive fact, but to show the existence of such a state of the testator's mind, at the time of the execution of the will in question, as rendered him susceptible to improper influences.[34] Where evidence of such declarations is received to establish the incapacity of the testator to perform the testamentary act in question, these dec-

[33] See the cases cited, Thayer, Cases on Evidence (2nd ed.), page 623, note 1.

[34] Herster v. Herster, 122 Pa. St. 239.

larations are considered solely in the character of specimens of the testator's talk affording the basis for an inference that his mind was unsound; if evidence of the statements of the testator is offered to show that the facts asserted in such statements actually existed, it is inadmissible unless such statements accompanied some other act which itself is admissible.[35]

Although evidence of declarations of the testator made both before and after the execution of the will is admissible to show his state of mind when that is in issue, there are limitations upon its admissibility for that purpose, fixed by the nature of the mental unsoundness thus to be shown. If the mental affection is one that occurs frequently, and lasts but a short time, the evidence must be of declarations made by the testator very near to the execution of the will. Where the derangement is one of gradual advancement and long continued duration, evidence of declarations made by the testator some time before or after the execution of the will is admissible. These considerations make up in every case a varying question of fact for the court to answer in passing upon the admissibility of the evidence; namely: Were the declarations made a reasonable time before or after the will was executed?[36]

To establish the contents of a lost will. It is submitted that on principle evidence of declarations by a testator, whether made before or after the execution of a will, is not admissible to establish the

[35] Waterman et al. v. Whitney et al., 11 N. Y. 157.
[36] Herster v. Herster, 122 Pa. St. 239.

contents of a lost will. There is some authority, however, for a different rule. Within the present exception to the hearsay rule, evidence of the ante-testamentary declarations of a testator, bearing upon his intentions in executing a lost will, is admissible to corroborate other evidence of the contents of the will.[37] This is because the correspondence between the prior testamentary declarations of the testator and the other direct evidence of the contents of the will makes it more likely that such direct evidence of the contents is true. Evidence of the testator's post-testamentary declarations of the same nature was stated to be admissible, within the exception, for the same purpose in a leading English case.[38] This had been previously denied in the same jurisdiction.[39] In Sugden v. Lord St. Leonards, the contents of the lost will had sufficiently been made to appear without resort to evidence of the testator's post-testamentary declarations, and, on that account, the doctrine of the case in that particular is a dictum, and Quick v. Quick is not overruled. Sugden v. Lord St. Leonards has been disapproved on this point in England,[40] but is followed in some American jurisdictions.[41]

[37] Doe d. Shallcross v. Palmer, et al., 16 Q. B. 747 (Eng.). The evidence was received in this case to rebut the presumption that an alteration of the will was made after the will was executed.

[38] Sugden v. Lord St. Leonards, 1 Pr. Div. 154 (Eng.).

[39] Quick v. Quick, 3 Sw. & Tr. 442 (Eng.).

[40] Woodward et al. v. Gouldstone et al., 11 App. Cas. 469 (Eng.).

[41] In re Page, 118 Ill. 576. In Clarke v. Turner et al., 50 Neb. 290, it was held that evidence of declarations of the testator, made both before and after the execution of a will, which bore upon his intentions in making it, was admissible to corroborate other evidence of the contents of the will, which had been stolen. In New York, by statute, the contents of a

90. **Declarations which are a part of some fact or transaction that is itself admissible—The exception stated.**—Statements made contemporaneously with an admissible act, and characterizing or explaining it, may be shown otherwise than by the testimony of the person who made them, to establish the existence of facts asserted therein.

91. **Scope of the exception.**—This exception to the hearsay rule is usually called by the Latin phrase res gesta. In order that evidence of a declaration may be admissible under the exception the following conditions are necessary: (1) An act in itself admissible in the case independently of the declaration that accompanies it; (2) something said simultaneously, or almost simultaneously, with the occurrence of such act; (3) the characterization or explanation of such act by what is said when it happens. When these conditions exist it is not material to inquire by whom the characterizing or explanatory declaration was uttered.

An act in itself admissible. Evidence of declarations, accompanying, characterizing, or explaining an act is inadmissible unless the act would be evidence without the declaration. For example, upon the trial of an action to recover damages for an obstruction of light to the plaintiffs' hotel, alleged to have been caused by alterations made to the defendant's buildings adjoining, the plaintiffs called as witnesses several servants of the hotel, who testified that on occasions, after the defendant had al-

lost will must be shown by at least two credible witnesses. A properly authenticated draft is equivalent to one witness. New York Code of Civil Procedure, §§ 1865, 2621.

tered his buildings, guests who came to the hotel objected to rooms assigned to them because of the darkness of those rooms. Since no special damage had been alleged for loss of custom, the acts of the guests in leaving the hotel were not of themselves admissible, and hence evidence of the declarations of the guests accompanying those acts was not within the exception.[42]

The admissible act and the characterizing declaration must occur practically simultaneously. This principle is strictly applied. Thus, upon the trial of an indictment for murder, the prosecution, after showing that the deceased had been in her house with the prisoner and "in a minute or two" had rushed out with her throat cut, said something to her employees and died, purposed to show what it was she had said; the statement was held not to be part of the res gesta, "for it was not part of anything done, or something said while something was being done, but something said after something done."[43] The principle is not so closely applied in this country.[44] In a Massachusetts case,[45] upon the

[42] The Gresham Hotel Company v. Manning Irish Rep., 1 C. L. 125. It is to be observed also that the declarations in this case concerned matter of opinion and evidence of them was inadmissible under the rule, § 92 et seq. The res gesta exception cures the defect of hearsay but not the defect of opinion.

[43] Regina v. Bedingfield, 14 Cox C. C. 341 (Eng.).

[44] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 12, note 1.

[45] Commonwealth v. Hackett, 2 Allen 136 (Mass.). It has been pointed out that the res gesta exception to the hearsay rule has been confused by the treatment, as parts of the res gesta, of statements made by an agent in his capacity as such, i. e., in the course of and as part of his duty, and of statements made by a raped female soon after the commission of the crime. (Thayer, Cases on Evidence [2nd ed.], page 641,

trial of an indictment for murder, a witness who testified that, when the fatal wounds were inflicted he had heard the victim exclaim: "I am stabbed!" and had reached him twenty seconds later, was allowed to testify that he had then heard him say: "I am stabbed—I am gone—Dan Hackett stabbed me!" The former case is an extreme application of the principle which requires that the declaration be simultaneous with the admissible act, and it would

note.) Evidence of the first mentioned statements is admissible simply because, by a rule of the substantive law of agency, they are the admissions (see § 188) of the principal who, either expressly or impliedly, authorized them to be made. The reason for the reception of evidence of statements of the injured female in rape cases is a survival of the requirement in the old law of rape, that an accused could not be found guilty of that crime unless the woman involved had made hue and cry after him immediately following the perpetration of the offense. (See the remarks of Holmes, J., in Commonwealth v. Cleary, 172 Mass. 175.) By the general American rule only the making of a complaint by the female and not the details stated therein can be shown. (See the cases cited, Stephen, Digest of Evidence [Chase's 2nd ed.], page 24, note 1.) But such evidence, unless practically simultaneous with the act of rape itself (and so part of the res gesta) is receivable only in confirmation of the ravished woman and hence cannot be admitted unless she testifies. (See the remarks of Parke, B., in Regina v. Guttridge, 9 C. & P. 471 [Eng.].) When thus received it may be admitted under circumstances where it could not come in as part of the res gesta, e. g., the complaint of a child made to her mother the morning after the commission of the alleged rape (Commonwealth v. Cleary, supra).

Evidence of the oral or written declarations of a bankrupt made before or upon his leaving home, which account for his departure, is admissible in proceedings by the bankrupt's trustee against one of the bankrupt's creditors to establish that the bankrupt departed with intent to defraud his creditors, i. e., that he committed an act of bankruptcy. Evidence of declarations of this kind is sometimes said to be received under the res gesta exception to the hearsay rule. It is by virtue of another exception to that rule—that which renders certain statements bearing on the intention of the party who makes them admissible (§ 87 et seq.), that this evidence is received in cases of bankruptcy. (The rule is well stated by Gray, J., in Mutual Life Insurance Company v. Hillmon, 145 U. S. 285.) The declarations in the bankruptcy cases, as in the rape cases, need only be reasonably near in time to the act they qualify and need not, as in the res gesta cases, be practically simultaneous with that act.

seem sufficient if the declaration comes immediately after the act it characterizes or explains.

Narrative of past occurrences excluded. If the act which a statement characterizes has completely happened so long before the statement is made that the statement is the mere narrative of a past occurrence, and not the spontaneous product of the occurrence itself, evidence of the statement is not within the exception. For example, in an action to recover damages alleged to have been caused by a railroad accident, the statement of a witness that, between ten and thirty minutes after the accident occurred, the engineer in charge of the defendant's train, on which the plaintiff was riding when the accident happened, had said to the witness that the train had been moving at the time of the accident at the rate of eighteen miles an hour, was inadmissible.[46]

[46] Vicksburg and Meridian Railroad v. O'Brien, 119 U. S. 99. See also Waldele v. The New York Central & H. R. R. R. Company, 95 N. Y. 274, LEADING ILLUSTRATIVE CASES.

CHAPTER VII.

OPINION.

92. **Opinion—The rule stated.**—A witness is not permitted to give his opinion in regard to the existence or non-existence of any fact involved in a legal proceeding, except in certain cases.

93. **Explanation of the rule.**—It is the province of the jury, by the process of inference described in the introductory chapter, to determine the existence or non-existence of all facts, evidential, or ultimate, in a given case. The jury, from their experience as human beings, first form an opinion on the evidential facts, and then using that opinion as a basis, form an opinion on the ultimate facts. Evidence is the raw material by means of which the jury must arrive at the first opinion, before that opinion may be the basis for the larger opinion resulting in a verdict.

Thus, upon the trial of an indictment for the murder of F, the prosecution presented evidence to show that, before the death of F's wife, the defendant had planned to secure certain insurance on F's life which had been taken out for the benefit of F's wife, and that, to accomplish that result, the defendant had first murdered F's wife, then had induced F to make her (the defendant) the beneficiary of such insurance, and had then murdered F. Here the jury first had to form an opinion as to whether or not the alleged criminal scheme existed. When

they found that such a scheme did exist, a motive for the murder of F was thereby made to appear. The evidential fact of a motive for the crime rendered the murder of F by the defendant more likely, and, therefore, in connection with other evidential facts, afforded the basis on which the jury formed the opinion that the main ultimate fact in the case, i. e., the murder of F by the defendant, existed.[47] That is to say, "in applying evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two duties to perform: first, * * * to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue."[48]

This province of determining the existence or nonexistence of all facts, evidential and ultimate, belongs to the jury alone. Witnesses may not do more than furnish the raw material—evidence—and consequently must speak only of facts of which they have personal knowledge, i. e., which have been made known to them through their senses. From this it follows that witnesses may not, in general, testify as to the inferences which they have derived from facts within their knowledge, that is, they may not testify as to conclusions therefrom which they have persuaded themselves to believe. This principle is tersely stated in the rule of evidence that the opinions of witnesses, except in certain cases, are inadmissible.

[47] Commonwealth v. Robinson, 146 Mass. 571.

[48] Shaw, C. J., in New England Glass Company v. Lovell, 7 Cushing 319 (Mass.).

94. **Matter of fact and matter of opinion distinguished.**—There is no hard and fast line separating matters of fact from matters of opinion, yet, just as in the ordinary affairs of life a distinction between matters of fact and matters of opinion is acknowledged, so a similar distinction exists, and is applied, in courts of law. "It is true that even the simplest sensation involves some judgment; * * * when, however, this judgment is of so simple a kind as to become wholly unconscious, and the interpretation of appearances is a matter of general agreement, the object of sensation may, for our present purpose, be considered a fact."[49] Thus when an ordinary witness states that he recognized a masked person in the night time by the person's voice, he states a fact and not his opinion.[50]

95. **Opinion evidence, when admissible.**—It is not true that, merely because a thing is matter of opinion, opinion evidence is admissible. On the contrary, opinion evidence is not admissible, unless it will aid a tribunal to decide a case in which it is necessary to pass upon a matter of opinion. Subject to the conditions of the exceptions to the rule excluding opinion evidence, then, such evidence is generally admissible when, in the judgment of the court, the opinion to be expressed will help the jury, and otherwise such evidence is not admissible.

96. **Typical cases.**—For example, in an action to recover damages for injuries alleged to have been caused by the negligent collision of a car with a

[49] The Influence of Authorities in Matters of Opinion, George Cornewall Lewis, page 1, quoted Thayer, Cases on Evidence (2nd ed.), page 675.

[50] Ogden v. People, 134 Ill. 599.

truck, a witness was asked: "Suppose a truck weighing nineteen hundred pounds, or thereabouts, carrying a load of thirty-six hundred pounds, or thereabouts, and drawn by a horse weighing twelve to thirteen hundred pounds, or thereabouts, and that the horse and truck were being driven up Broadway and were at the time within one hundred feet south of Walker street driving north, with the horse on a walk, and the horse being a gentle and tractable animal under full control at the time, within what distance could such a truck, under such circumstances, be stopped, the pavement being wet with sprinkling carts?" An objection to the question was overruled and the witness answered: "Between three and four feet." In deciding an appeal taken upon an exception to the reception of this opinion evidence, the court said: "The answer to such a question can be of but little service to jurors. They are generally well acquainted with such common things as trucks and horses, and the power, actions, and capacity of horses, which, particularly in the City of New York, are constantly open to observation. * * * The question is barely competent."[51] It would seem that the answer was nothing more than a guess, and that it would have been better to have allowed the jury to guess directly for themselves upon the effect of the facts involved.

So in an action to recover damages for personal injuries caused by a fall from the defendant's platform, in which the plaintiff alleged that the platform had been negligently maintained, a witness was

[51] O'Neil v. The Dry Dock, etc., R. R. Company, 129 N. Y. 125.

allowed over objection, to state: "In my personal opinion, I would unhesitatingly say that the platform, from the way it is built, is not only not safe, but is actually a trap, from the very fact that it is raised nine inches above the level of the ground, without any side protection. People walking towards the front are very apt to make the least step sideways and go down." Holding the reception of this testimony to be error, the appellate court said: "The alleged dangerous place was a raised part of the platform, or broad step, four feet wide and nine inches high. It came clearly within the range of ordinary experience. The briefest statement would convey a perfect comprehension of the place, and every juryman who ever got in or out of a car, or went up or down a flight of steps, was as capable of judging of the alleged danger as the witnesses who gave their opinions."[52]

97. **Opinions of ordinary witnesses, when admissible.**—An ordinary witness may state the comparative shape, color, or sound of a thing; the probable lapse of time between certain events; the appearance of a person, as healthy or sick, excited or calm, and many similar matters,[53] although they are expressions of opinion, as "a compendious mode of ascertaining the result of the actual observation of the witness."[54] So an ordinary witness, who has had special opportunities for observing the subject of his opinion, is allowed to state a conclusion

[52] Graham v. Penn. Company, 139 Pa. 149.

[53] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 141, note 2.

[54] Parke, B., in Wright v. Doe d. Tatham, 5 Cl. & F. 676 (Eng.).

reached by him as the result of a conscious exercise of judgment upon many matters more difficult to estimate than those enumerated.

Sanity. The opinion of an ordinary witness, who has personally observed the appearance and conduct of a person, as to whether that person is sane or insane, is admissible, when the facts upon which such opinion is based are also stated.[55]

Handwriting. The opinion of an ordinary witness who has seen a person write once or more,[56] or has had a mutual correspondence with a person,[57] or who has, in the ordinary course of his duty, often seen the handwriting of a person,[58] as to whether a particular specimen of that person's handwriting is genuine or not, is admissible.

Value. The opinion of an ordinary witness who has seen a particular thing, and is acquainted with the value of similar things, upon the value of that thing, is admissible.[59] Sometimes, too, such a witness may state his opinion upon the value of a thing he has not seen, but statements of opinion of this character are inadmissible when they are themselves hearsay, unless they come within one of the excep-

[55] Connecticut, etc., Insurance Company v. Lathrop, 111 U. S. 612, LEADING ILLUSTRATIVE CASES. New York, Massachusetts, and Pennsylvania, however, exclude such evidence, Thayer, Cases on Evidence (2nd. ed.), page 685, note 1; and the cases cited. In New York such a witness may testify to the conduct of a person as observed by him and characterize it as rational or irrational. People v. Strait, 148 N. Y. 566. Generally the subscribing witnesses to a will are allowed to give their opinion as to whether or not the testator was sane when he executed the will. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 141, note 2.

[56] Hammond v. Varian, 54 N. Y. 398.

[57] Riggs v. Powell, 142 Ill. 453.

[58] Rogers v. Ritter, 12 Wallace 317 (U. S.).

[59] Clark v. Baird, 9 N. Y. 183.

tions to the rule excluding hearsay evidence. Such statements of opinion, when sworn to, however, are not inadmissible because they are based upon hearsay, if the basis of the opinion is one usually relied upon, e. g., daily current price lists, or returns of daily sales in certain lines of business.[60]

98. **Expert opinion evidence.**—The opinion of a witness upon a subject with which ordinary men are unfamiliar, but concerning which the witness has technical knowledge, is sometimes admissible. If, in the judgment of the court, the jury will be helped in the decision of a question requiring peculiar training for its determination by the opinion of a witness especially trained in the matter, the opinion of such a witness on such a question is admissible. The witness who expresses such an opinion is called an expert.

99. **Expert opinion, how presented.**—When expert opinion evidence is admissible, the party who calls the witness by whom the opinion is to be expressed, must first show the witness to be an expert, i. e., to have special or technical knowledge of, or training in, the matter upon which the opinion of the witness is to be given. This may be shown by the testimony of the witness himself. Whether or not such a witness is qualified to express an expert opinion in a particular case is a question of fact for the court.

100. **Same subject; hypothetical questions.**—The expert witness must base his opinion either upon

[60] Whitney v. Thacher, 117 Mass. 523. See also the cases cited, Thayer, Cases on Evidence (2nd ed.), page 697, note 1.

undisputed facts or facts assumed to exist. If he has personal knowledge of the facts upon which his opinion is based, he may state them in explanation of his opinion; if he has not such personal knowledge, he must be asked a hypothetical question calling for his opinion upon a state of facts assumed to be true. He cannot be asked his opinion upon the facts proved, or which he deems to be proved, or his opinion upon the evidence as he has heard it. An illustration will make the reason for this apparent. Suppose the question to be whether A is sane or insane. C and D have been neighbors of A for many years. C swears that A has always acted and talked rationally. D swears that A imagines himself to be Julius Caesar and has always talked and acted as if he were leading armies to battle. An expert witness in such a case obviously cannot be asked whether in his opinion "upon the facts proved," or "upon the facts you deem to be proved," or "upon the evidence as you have heard it," A is sane or insane, for the fact of A's conduct, as rational or irrational, is to be determined by the jury before which that issue is tried, and the evidence as to such conduct is conflicting. If, however, a tribunal determines that the facts assumed in a hypothetical question put to an expert exist, it may then use the expert's opinion as an aid in deciding the case.

Medical matters as the subject of expert opinion. The opinion of a skilled alienist, especially trained in the diagnosis of mental diseases, as to whether a person is sane or insane, is in a proper case admis-

sible.[61] So, in a proper case, a medical expert witness may state his opinion as to the cause of the death of a person, or as to the cause of physical ailments which have not resulted in death.[62]

Legal matters as the subject of expert opinion. A lawyer practicing in a foreign jurisdiction may in a proper case state his opinion as to the common law of that jurisdiction upon any point, and, in some jurisdictions, as to the statutory law of a foreign jurisdiction upon any point. The manner in which a rule of foreign law may be proved is generally regulated by statute in this country.[63]

Value as the subject of expert opinion. The opinion of a real estate broker or appraiser who knows the value of real property in any particular locality is in a proper case admissible upon the question of the value of a parcel of real property situated in that locality.[64]

[61] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 147, note 1.

[62] Donnelly v. St. Paul City R. Company, 70 Minn. 278, 280.

[63] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 145, note 1.

[64] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 143, note 2.

An expert may also give his opinion as to whether two documents were written by the same person or by different persons. There is a great conflict of opinion as to whether collateral and irrelevant writings may be made the basis of comparison by the expert. That this may be done is admitted in many jurisdictions; others hold that comparison of the disputed writing may be made by the expert only with a writing properly in evidence in the case for other purposes. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 154, note 1.

PART II

FORMS IN WHICH JUDICIAL EVIDENCE MAY BE PRESENTED

CHAPTER VIII.

REAL EVIDENCE.

101. **Introductory.**—In the first chapter it was said that judicial evidence might be presented in the form of either the statement of a witness, a document, or of something applied directly to the senses of legal tribunals. These forms of evidence will now be dealt with in inverse order.

102. **Real evidence defined.**—Things which, by their submission directly to the senses of a legal tribunal, convince it that a fact disputed before it exists or does not exist, are real evidence. Clearly, the submission of an object to the senses of a tribunal may often afford the basis for an inference, in respect to a matter in issue, without the aid of testimony or document. Such an object, so presented, must, therefore, be evidence.

103. **Examples of real evidence.**—Thus where the question was whether or not a coat fitted properly, and the customer put on the garment in the presence of the tribunal, the thing spoke for itself on the question controverted and so supplied real evi-

dence on the point.[65] The inspection of a person to determine his age, when his infancy is controverted, or of a bastard, when his paternity is in question, for comparison of his features with those of the putative father, are other illustrations of evidence of this nature.[66] The exhibition of an injured limb, in actions for personal injuries, is another example.[67]

104. **Same subject.**—Upon the same principle a jury, under the supervision of court officers, may, in the discretion of the court, be allowed to view real property in litigation, or any place at which a material litigated fact took place. Photographs, charts, maps, plans, models, and similar contrivances, representative of things which would themselves be real evidence, are treated as evidence of the same character, when properly authenticated, unless that rule of writings which prescribes that an original writing must be produced, prevents this. Experiments of any kind made before a legal tribunal belong in the same category.

105. **The rule stated.**—Real evidence is inadmissible if, in the judgment of the court, its presentation

[65] Brown v. Foster, 113 Mass. 136.

[66] Ihinger v. The State, 53 Ind. 251; Gaunt v. The State, 50 N. J. L. 490. In some jurisdictions the opinion of witnesses having a deeper acquaintance with average appearances is admissible to supplement the jury's inspection on this question. But by the better view such evidence is excluded because of its very doubtful utility to the jury. See the authorities cited in Gaunt v. The State, supra.

[67] The authorities are not in accord on the question of the power of a legal tribunal at common law to demand the submission by a party to an examination of his person. See the cases cited, Thayer, Cases on Evidence (2nd ed.), page 728, note. It has been held that a witness may swear to his own age. See the cases cited, Thayer, Cases on Evidence (2nd ed.), page 727, note.

would unduly prejudice a party, or would be offensive to modesty and decency. Thus the amputated foot of a child was excluded in a negligence case.[68] But in another case amputated toes were allowed to be shown to the jury.[69] These two cases show that there is no absolute rule in this matter; indeed, the rule is but a specific application of the broader rule excluding unimportant, prejudicial, and misleading matters.[70] The common sense of the court alone can determine the impropriety of real evidence, and the exercise of discretion by a tribunal in this respect will not be declared error, unless that discretion has been plainly abused.

[68] Rost v. Brooklyn, etc., R. R. Company, 10 N. Y. App. Div. 477, 481.
[69] Nebonne v. Conc. R. Company, 68 N. H. 296.
[70] § 4.

CHAPTER IX.

DOCUMENTS.

106. **Proof of authorship of documents.**—The rules of the law of evidence prescribe the manner of the presentation of evidence which they do not exclude. In this respect the operation of these rules is concerned with the use by legal tribunals of that form of evidence described as a document to fix the manner in which the authorship of a document shall be proved.

107. **A document defined.**—A document, practically speaking, is a writing. As a physical object it may be real evidence of its own existence, and, in that aspect, of nothing else. But as an account of the acts and rights of parties it may be used as evidence of many more important facts, and it is with regard to the use of writings in this character that the law of evidence lays down rules prescribing the manner of their presentation.

108. **Attested and unattested writings.**—In so far as proof of their authorship is concerned, writings are either attested or unattested. A writing is attested when a person, at the request of the author of the writing, subscribes it as a witness to its execution.

109. **Writings, how presented.**—A writing, generally, is not presented sufficiently, to admit of its use as evidence, merely by the production of it

before a legal tribunal. It is necessary first to show the execution of it.

110. **Execution of unattested writings, how shown.**—The execution of an unattested writing may be shown by the testimony of the person who made it, or of some person who saw it written, or, if it is signed, saw the signature thereto written.[71] If this means of proof is not to be had, evidence of the handwriting of the author of the document, in the manner which has been previously explained, must be given.[72]

111. **Execution of attested writings, how shown.**—At common law the testimony of at least one subscribing witness is the only means of proving the execution of an attested writing. Where the writing is attested by several witnesses, the testimony of one of them is sufficient, except in the case of a writing required by law to be attested and proved by more than one witness.[73] Since an attesting witness is called to testify only to the execution of the attested writing, he swears only to the fact that his signature upon the writing is genuine.

Reason for the rule. The reason most often given to account for the imperative rule that the execution of an attested writing can be shown only by the testimony of a subscribing witness is that the parties to an attested writing are presumed to have agreed that the writing shall not be used as evidence unless the attesting witness is called to testify to its exe-

[71] Taylor, Evidence (9th ed.), § 1862, quoted Thayer, Cases on Evidence (2nd ed.), page 735, note 1.

[72] See § 97 and page 355, note 64.

[73] See Stephen, Digest of Evidence (Chase's 2nd ed.), page 182, note.

cution.[74] This is a convenient fiction merely. The rule is the outgrowth of forms of ancient procedure and the reasons for it are historical. It is the survival of an ancient custom by which the attesting witnesses did battle for the instrument in case it was disputed and hence, after trial by jury supplanted trial by battle, the plighted witnesses testified to prove the instrument.[75]

Where each of the subscribing witnesses to an attested writing is either dead, or insane, unknown, or without the jurisdiction, or is not by due diligence to be found, refuses to testify, or denies that he attested the writing, or cannot recollect whether he did or not, the execution of such writing may be shown by other means. Since the execution of an attested writing is sufficiently shown by the testimony of one subscribing witness thereto that his signature upon it is genuine, the execution of the writing cannot be shown by other means until the failure of each attesting witness thereto, to be called for that purpose, is explained on one of the grounds stated. The rule is not uniform as to the means by which the execution of an attested writing may be shown when failure to produce every attesting witness thereto has been accounted for on one of the recognized grounds. According to the weight of authority the signature of at least one of the attesting witnesses to such a writing must be shown to be genuine by proof of his handwriting and only when that is shown to be impossible may resort be had to

[74] Whyman v. Gath, 17 Jur. 559 (Eng).

[75] Thayer, Cases on Evidence (2nd ed.), page 735, note.

proof of the handwriting of the author of the attested writing.[76] In some jurisdictions, however, proof of the handwriting of the author may be presented without the authentication of the signature of any attesting witness, even where it does not appear that such authentication is impossible.[77]

112. **Same subject—When the rule does not apply.**—Where an attested writing is not the basis of a cause of action, but comes into question collaterally in a case, it is not necessary to show its execution even when the attesting witnesses are available for that purpose.[78] The attested writing under such circumstances may be connected with its author by other means in the first instance.[79] The same is true of an attested writing which the adversary of a party refuses to produce upon proper notice. In this last instance, the exception to the rule is a penalty inflicted upon the recalcitrant party as a matter of court discipline for failure to produce the document.[80]

113. **Same subject—Statutory modification of the rule.**—The common law rule prescribing the method of proof of the execution of an attested writing has been greatly modified by statute in most jurisdictions. The effect of this legislation is to allow the execution of an attested writing, which is not required by law to be attested, to be shown as if there were no attesting witnesses to it.[81]

[76] Pelletreau v. Jackson, 11 Wend. 110 (N. Y.).
[77] Newsom v. Luster et al., 13 Ill. 175.
[78] Curtis v. Belknap, 21 Vt. 433.
[79] Demonbreun et al. v. Walker et al., 4 Baxter 199 (Tenn.).
[80] Cooke v. Tanswell, 8 Taunt, 131 (Eng.).
[81] See Thayer, Cases on Evidence (2nd ed.), page 754, note 1.

114. **Proof of execution—When unnecessary.**—Any writing is presented sufficiently for its use as evidence merely by its production before a legal tribunal, that is, proof of its execution is dispensed with, where the adverse party produces it and claims an interest under it, or admits its execution, or where it is not less than thirty years old at the time of the proceeding in which it is presented.

The writing used by an adversary. The execution of an attested or unattested writing need not be shown by a party when his adversary produces the writing and claims an interest under it.[82] Both parties then assert the authenticity of the writing and proof of its execution is, therefore, unnecessary.

Execution admitted by an adversary. If the writing is unattested and the author, being one of the parties to the action, admits it to be authentic, the execution of it need not be shown. As to the effect of an admission by the author as a waiver of proof of the execution of an attested writing, the courts are not agreed. It has been held that an oral admission before trial of the execution of an attested promissory note dispenses with the necessity of proof of the execution of the note.[83] This doctrine has since been limited to writings not under seal,[84] and has been characterized as a "departure from the rule."[85] The prevailing rule is that a solemn admission—one made by stipulation or in the pleading of a particular case—dispenses with proof of the

[82] Thayer, Cases on Evidence (2nd ed.), page 750, note 1.
[83] Hall v. Phelps, 2 Johns. 451 (N. Y.).
[84] Fox et al. v. Reil et al., 3 Johns. 477 (N. Y.).
[85] Brigham v. Palmer, 3 Allen 450 (Mass.), LEADING ILLUSTRATIVE CASES.

execution of an attested writing.[86] Other admissions have not this effect.[87]

Ancient documents. An attested or unattested writing which is not less than thirty years old at the time of the proceeding in which it is presented is often said to have the quality of "proving itself." This means that no proof of the execution of such a document need be given.[88]

Recorded writings. In many jurisdictions certain writings cannot be recorded unless they have been acknowledged before a competent officer. The record of such documents is on that account evidence that writings which have been thus recorded are authentic, and where copies from the registry are made admissible as evidence by statute no further proof of the execution of a writing so recorded is necessary.[89]

115. **Proof of contents of writings—Best evidence rule.**—"It is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable."[90] This quotation is the statement of a principle called the "best evidence rule" which obtained, somewhat loosely, before the definition of the rules of the law of evidence and the exceptions to those rules cut

[86] Stephen, Digest of Evidence (Chase's 2nd ed.), Art. 66, and the cases cited, page 183, note 3.

[87] Thayer, Cases on Evidence (2nd ed.), page 758, note 1.

[88] See § 60.

[89] Thayer, Cases on Evidence (2nd ed.), page 777, note 1. In some jurisdictions a distinction is made between deeds to a party to an action and deeds to third persons. The former must be produced, while in the case of the latter a copy from the registry is sufficient. Gragg v. Learned, 109 Mass. 167.

[90] McKinnon v. Bliss, 21 N. Y. 206.

down the opportunities for its application.[91] Today the "best evidence rule" means only that a party who would show the contents of a writing must produce the original writing or account in a manner legally satisfactory for its non-production. The rule applies to all writings, sealed and unsealed.

116. **Inscriptions not within the rule.**—All written inscriptions are not writings within the rule. Inscriptions on banners carried in a riot, or a direction on a parcel, do not constitute the banners, or address tags, writings.[92] Inscribed articles must be of some importance to make writings of them. Banners, address tags, and other small portable articles, bearing inscriptions which are short and easily remembered, partake more of the character of speeches than of writings, and are so regarded upon questions as to the method of proving inscriptions upon them. Whether or not inscribed objects, other than papers, are within the rule is in each case a matter to be decided by the court in its discretion.

117. **Scope of the rule.**—It is to be noticed also that although a writing is the best evidence of its own contents it is not the only means of proving facts asserted in it. For example, where a landlord and tenant enter into a written lease, the terms of the lease cannot be shown except by the instrument itself, unless its non-production is first accounted for on some ground legally sufficient, but the fact that the relationship of tenancy exists between the parties may be shown orally, without the production

[91] An account of the evolution of the rule is given in Thayer, Cases on Evidence (2nd ed.), page 778.

[92] Commonwealth v. Morrell et al., 99 Mass. 542.

of the lease, or any explanation of failure to produce it.[93]

A writing produced is, of course, real evidence of its own existence, though not of its execution. Accordingly where some reason legally satisfactory is offered to account for the non-production of a writing, but the fact of the existence of the writing is denied, the fact of such existence must be shown before the contents may be proved otherwise than by the writing. Secondary evidence of the contents of a writing is also inadmissible, although the non-production of the writing is legally excused, unless the execution of the writing is first established.

Duplicate original writings. The "best evidence rule" always requires that an original writing be produced or its non-production legally explained. Where several writings having identical contents are made at the same time, if one is intended to serve as the original and the rest are intended for copies, the original must be produced or its absence accounted for; but if all the writings so made are intended to serve as duplicate originals, then each of them is primary evidence of the contents of the writing, and the production of any one satisfies the rule, but the non-production of all such duplicate originals must be satisfactorily accounted for before secondary evidence of the contents of such writing is admissible.[94]

[93] The King v. The Inhabitants of Holy Trinity, 7 B. & C. 611 (Eng.).

[94] To constitute writings duplicate originals they must have been made directly one from the other. A copy of a copy is not a duplicate original. A letter press copy of a writing is not a duplicate original because it is intended to serve only as a copy. Goodrich v. Weston, 102 Mass. 362, LEADING ILLUSTRATIVE CASES.

118. **Excuses for non-production.**—The original writing need not be produced if it is lost, destroyed, without the jurisdiction, or under the control of the adverse party; or if it is too voluminous or bulky, or is a public document, or has been recorded.

The writing lost or destroyed. The loss or destruction of a writing is an excuse for its non-production sufficient to allow proof of its contents by secondary evidence if it is first made to appear that a reasonably diligent search for it has in good faith been made. This is true even where the writing has been lost or destroyed by the party who offers secondary evidence of its contents, when the absence of a fraudulent intent in the loss or destruction of the writing is shown.[95] The sufficiency of proof of these matters presents a question of fact for decision by the court.

The writing without the jurisdiction. Possession of a writing by a third person residing without the jurisdiction of the court is a sufficient legal excuse for its non-production and, in some jurisdictions, without proof of efforts to obtain the original. In other jurisdictions it is a question for the court whether, when the original is out of the jurisdiction, sufficient effort to obtain it has been made.[96]

[95] Steele v. Lord, 70 N. Y. 280.

[96] Wigmore, Evidence, § 1213, and cases cited. If a third person residing within the jurisdiction of the court has possession of the writing its production is necessary and may be compelled by subpoena duces tecum; should such a party for legal cause refuse to produce the writing secondary evidence of its contents is admissible. Where such a party contumaciously refuses to produce the writing, some authorities hold secondary evidence admissible; others that secondary evidence is inadmissible, and that the only remedy is against the party refusing to produce the writing. Wigmore, Evidence, § 1211, and cases cited.

The writing under control of an adversary. Control over a writing by the adverse party is a valid legal excuse for its non-production, provided a written notice demanding the writing is delivered to that party or his attorney in time to permit him to procure the writing and produce the same at the trial upon which it is to be used; such a notice is called a notice to produce, and upon the failure of the party after such notice to bring the original writing into court, secondary evidence of the contents of the writing is admissible.

Whether or not the notice to bring the original writing into court has been properly served must depend upon the circumstances in each case. Thus, where a writing is in the possession of the adversary in the court room, a request in court at the time of the trial for its production is sufficient.[97] In some cases no such notice to produce is necessary. Thus, where the writing, the contents of which are to be shown, is in itself a notice, e. g., a notice by a landlord to a tenant to quit demised premises, or a notice of the dishonor of a bill of exchange,[98] or is a writing directly involved in the cause of action or defense so that the nature of the action in effect notifies the adversary that the writing will be required, a notice to produce it need not be served.[99] It is a rule of court discipline that an adversary who, after due notice to produce a writing, willfully neglects to do so, cannot thereafter make use of the writing to rebut sec-

[97] Dwyer v. Collins, 7 Ex. 639 (Eng.); Stephen, Digest of Evidence (Chase's 2nd ed.), page 194, note 3.

[98] Colling v. Treweek, 6 B. & C. 394 (Eng.).

[99] Lawson v. Bachman, 81 N. Y. 616.

ondary evidence received as proof of its contents, and, moreover, its non-production by him supplies the basis for an inference that its contents are opposed to his interests.

Voluminous and bulky writings. Where the entire contents of a voluminous writing are not to be shown, but only some fact asserted therein, the writing need not be produced and examined, but secondary evidence of its contents, in respect to the fact to be shown, is, in the first instance, admissible. This is true also of documents too bulky or heavy to be presented in court.

Public documents. If the original writing is a public document its contents may be proved, in the first instance, by the presentation of an exemplified copy in the manner generally prescribed by statute. By statute, too, in many jurisdictions, the contents of a recorded original, not a public document, may be shown in the first instance by a properly authenticated copy from the registry.[1]

119. **Degrees of secondary evidence.**—When secondary evidence of the contents of a writing is admissible, "the admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof."[2] This principle, often more briefly stated to the effect that "there are no degrees

[1] The oral admission of an adverse party dispenses with proof of the contents of a writing. Slatterie v. Pooley, 6 M. & W. 644 (Eng.). See the American cases contra cited, Thayer, Cases on Evidence (2nd ed.), page 809, note 1.

[2] Goodrich v. Weston, 102 Mass. 362, LEADING ILLUSTRATIVE CASES.

of secondary evidence,"[3] is a sound one, but many American courts deny it.[4] Copies of a writing, when shown to be correct, are competent secondary evidence of the contents of the writing from which the copies were made.[5] The testimony of a witness who has heard a writing read is inadmissible for this purpose by the rule against hearsay evidence, but that objection is held not to apply to a copy examined by a person while the original is read to him.[6]

120. **The so-called parol evidence rule.**—Various rules of the substantive law are commonly expressed as rules of the law of evidence, by one of which parol evidence, when offered to contradict, alter, add to, or vary the terms of a written instrument, is inadmissible.

121. **The rule explained.**—The cases by which this rule has been applied have little concern with the law of evidence. They will be found to depend upon some rule of the substantive law by which, under certain circumstances, a writing in some particular form is required, rather than upon any rule of the law of evidence. The use of the word "parol" in this connection, since that word is ordinarily used as a synonym for "oral," is confusing. Either oral or written matter offered to vary the terms of a written instrument is excluded by the rule.

122. **Scope of the rule.**—It is to be noted at once that "the rules excluding parol evidence have no

[3] Per Lord Abinger, C. B., in Doe d. Gilbert et al. v. Ross, 7 M. & W. 102 (Eng.).

[4] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 191, note 1.

[5] Goodrich v. Weston, 102 Mass. 362, LEADING ILLUSTRATIVE CASES.

[6] Thayer, Cases on Evidence (2nd ed.), page 807, note 2.

place in any inquiry in which the court has not got before it some ascertained paper beyond question binding and of full effect."[7] Accordingly, where a written instrument is not produced for some reason legally satisfactory, and its existence is denied, parol evidence to show that it once existed is not within the rule. So fraud, illegality, accident, or mistake in the execution of a written instrument, or want of capacity, or authority to execute it, and many similar matters present to the court the preliminary question of fact whether or not the court has got before it "some ascertained paper beyond question binding and of full effect" which it must decide before it may know whether or not in any case the rule excluding parol evidence is applicable.[8]

123. **The rule in contracts.**—One of the most important rules of the substantive law, incorporated into the statement of the so-called parol evidence rule, is that precept of contracts which prescribes that an agreement reduced to writing determines what is the bargain between the parties to such agreement. But parol evidence to establish a great many matters is not within that rule.

To show a contract to be ineffectual. Parol evidence offered to show lack or failure of consideration in a contract, or to show that the contract was not to become operative except in an event which has not happened, is not excluded by the rule.[9]

[7] Per Sir J. P. Wilde, in Guardhouse et al. v. Blackburn et al., L. R. 1 P. 109 (Eng.).

[8] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 220, note 2.

[9] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 220, note 2.

To show a collateral agreement. Nor is parol evidence inadmissible under the rule when offered to show the existence and terms of an agreement touching the subject matter of a contract reduced to writing on a point not covered by the written instrument, provided such collateral agreement does not conflict with the written instrument and the latter was not intended by the parties to state the whole transaction between them.[10]

To show the whole bargain. The rule does not exclude parol evidence to show a bargain where the whole transaction has not been put into the written instrument, but "a paper has been drawn up which appears to have been meant merely for a memorandum of the transaction, e. g., an informal receipt for money—and not as containing the terms of the contract itself."[11]

To show the substitution of a new agreement. The rule does not apply to parol evidence offered to show the substitution of a new agreement for one in writing. It excludes only prior or contemporaneous parol matter tending to vary or contradict a written instrument.[12]

To show a custom. Parties engaged in certain callings are presumed to contract with reference to the customs of those callings, unless they expressly indicate a contrary intent in their agreements and, therefore, parol evidence to show a custom thus in-

[10] Chapin et al. v. Dobson, 78 N. Y. 74; Naumberg et al. v. Young et al., 44 N. J. L. 331.

[11] Allen v. Pink, 4 M. & W. 140 (Eng.).

[12] Thomas v. Barnes, 156 Mass. 581. But the Statute of Frauds may exclude proof of a subsequent oral novation. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 223, note 1.

corporated into a written contract is not, under the rule, inadmissible.

To show the real purpose of a contract. In a proceeding in equity between the parties to a written agreement the rule does not prevent the introduction of parol evidence to show that the instrument, although absolute on its face, was executed for a purpose different from that imported by its nature. Thus, a deed may be shown to have been intended as a mortgage.[13]

To explain an alteration. Parol evidence in proof or explanation of an alteration upon a written agreement does not vary but confirms the writing, and, on that account, is not within the rule.

124. **When the contracts rule does not apply.**—The rule excluding parol evidence to vary the terms of a written agreement binds only the parties to the agreement and their privies. It has no application in proceedings between strangers to the agreement, or in proceedings between a party to such an instrument and a stranger to it.[14]

125. **The rule in wills.**—In all jurisdictions statutes prescribe the form of a will, generally, that it shall be in writing and signed, and shall have several attesting witnesses. Accordingly upon the probate of a will, words omitted from it cannot be added to it by parol evidence, nor upon probate can words be struck out of a will by parol evidence where the will was read over to the testator before he signed it.

[13] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 220, note 2.

[14] This point is brought out in Kellogg v. Thompson, 142 Mass. 76, LEADING ILLUSTRATIVE CASES.

Thus, where a testator devised all his real estate in the county of Limerick and the city of Limerick to trustees, and it turned out that he had no estates in the county of Limerick, it was attempted to be shown by parol evidence that the testator intended his estates in the county of Clare to pass under the same devise. "If parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the testator to have been to include his estates in the devise to the trustees." Notwithstanding this, the evidence was excluded because, as clearly stated in the decision, it amounted "in short, by the admission of parol evidence, to the making of a new devise for the testator."[15]

Where, for example, upon the probate of a will and a codicil thereto, a lawyer offered to testify that in drawing the codicil he had inadvertently written into it the words "therein and," the effect of which was to discharge certain real property from pecuniary legacies of considerable amount with which they had been charged in the will, and to corroborate his testimony produced a rough draft of the codicil made by him in the presence of the testatrix and from her verbal directions, he was not allowed to do so, because the codicil had been read over to the testatrix before she had signed it, and the probate court, therefore, was powerless to remove from the codicil the words that got into it by accident. "If a statute require that a thing should be in writing and signed in order to its validity, it precludes the court from

[15] Miller v. Travers, 8 Bing. 244 (Eng.).

giving effect to parol testimony of that which is required to be so written and signed."[16]

Reason for the wills rule. By the Statute of Wills an instrument must be attested to be a will. Parol evidence is not attested, and hence is not a will. Parol evidence when offered to vary a duly executed will is excluded, therefore, "only on the ground of immateriality, not because it is secondary."[17]

126. **Principles and rules for the construction of writings.**—Before the meaning of a written instrument is made clear it is often necessary to ascertain (1) the meaning of expressions upon it and (2) how those expressions are affected by the extrinsic circumstances under which the instrument was executed. Parol evidence for either of these purposes is generally admissible.

127. **Technical language, how explained.**—Technical language used in a written instrument may be explained by parol evidence and the recognized meanings in a trade and locality of abbreviations found in such an instrument may be shown. So, too, if a cipher is used in a written instrument it may be translated by means of parol evidence.[18]

128. **The rules stated.**—If the words or signs upon a written instrument taken in their ordinary meaning make sense in reference to extrinsic circumstances, parol evidence to explain them is inadmissible. The primary, literal sense of the words or signs, where it does not give rise to an absurdity, must be put upon them. But if the words or signs

[16] Guardhouse et al. v. Blackburn et al., L. R. 1 P. 109 (Eng.).

[17] Per Sir P. J. Wilde in Guardhouse et al. v. Blackburn et al., supra.

[18] Maurin v. Lyon, 69 Minn. 257; Kell v. Charmer, 23 Beav. 195 (Eng.).

upon the instrument, when taken in their ordinary meaning, do not make sense with reference to extrinsic circumstances, parol evidence relating to those circumstances is admissible to show what such words and signs mean.[19]

129. **A typical case.**—For example: A testator by will leaves a legacy to the "Home of the Friendless in New York." Another society claims the legacy and shows that no institution of the name employed in the will exists. In this case with reference to the extrinsic circumstances the will makes nonsense. Parol evidence offered by the claimant of the legacy to show that it has usually been styled by the name "Home of the Friendless" indifferently by the testator and others, is admissible to establish the testator's intent in bequeathing the legacy. Had a society designated "Home of the Friendless in New York" been in existence, the parol evidence would have been inadmissible.[20]

130. **Other rules.**—If a written instrument is without any meaning whatever, as where it is left blank in some material respect, parol evidence as to its meaning is inadmissible, and the instrument is void for uncertainty.[21] So, if parol evidence offered in relation to extrinsic circumstances discloses for a written instrument no meaning which the words will bear, the instrument fails of effect for the same reason. For example: H, by his will, gave and devised

[19] The statement of the rules is based upon a quotation from Wigram's Treatise on Extrinsic Evidence in Aid of the Interpretation of Wills quoted in Thayer, Cases on Evidence (2nd ed.), page 916.

[20] Lefevre v. Lefevre, 59 N. Y. 434.

[21] Thayer, Cases on Evidence (2nd ed.), page 927, note 3.

a part of his residuary estate to "my niece, Mary Frances Tyrwhitt Drake." It appeared that he had no niece by that name. Parol evidence was then received to show that his sister-in-law bore that name and that he had a niece named Frances Isabella Tyrwhitt Drake, and that both the latter had been objects of his favor and affection. It was held that "the ambiguity remains after all the means employed for removing it have been exhausted," and the will was declared void for uncertainty.[22]

131. **A rule of evidence relating to writings.**—Parol evidence of declarations by the maker of a solemn instrument concerning the intentions he sought to express therein is inadmissible except where he has made use of a proper name equally applicable to more than one person or thing.

132. **Reason for the rule.**—The reason for this rule as a precept of the law of evidence is to be found in the ease with which evidence of parol declarations of the maker of a solemn instrument concerning his intentions sought to be expressed therein might be manufactured. The rule is, therefore, properly classified as a rule of the law of evidence because, for reasons of policy, it excludes matter logically probative of the thing to be ascertained, namely, the intentions of the author of the instrument.

133. **The exception explained.**—The reason for the exception to this rule of the law of evidence is historical,[23] and the courts confine its application

[22] Drake v. Drake et al., 8 H. L. C. 172 (Eng.).

[23] Thayer, Cases on Evidence (2nd ed.), page 1048, note.

strictly within its historical limits. Where the author of a solemn instrument employs therein a proper name that fits two or more persons or things, the result is what is called an equivocation, and parol evidence of declarations by the author of such a document concerning his intentions in making it is admissible to interpret the equivocation. For example: A testator devised a house to "George Gord, the son of Gord." Two George Gords, one the son of George Gord and the other the son of John Gord, claimed the devise. The result, therefore, was an equivocation, and parol evidence of declarations by the testator as to his intention in devising the real property in question was admitted to show which George Gord the testator meant to be the devisee.[24]

[24] Doe d. George Gord v. Needs, 2 M. & W. 129 (Eng.). See also the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 231, note 1.

CHAPTER X.

WITNESSES.

134. **Introductory.**—The law of evidence in prescribing the manner of the presentation of evidence which that law does not render inadmissible requires (1) "that it shall be given in open court, by one who personally knows the thing, appearing in person, subject to cross-examination; * * * (2) it fixes the qualifications and the privileges of witnesses, and the mode of examining them."[25]

135. **Incompetency defined.**—When it was first said that a witness was competent, what was meant was that he would be permitted to testify under oath. Hence, the important causes of the incompetency of witnesses at common law consisted in moral or mental inability to swear to the truth of what the witnesses would say to the tribunal. Other causes of the incompetency of witnesses owe their existence not to the law of evidence but to rules of different branches of the substantive law.

136. **Common law causes of incompetency.**—At common law a witness was not competent who: (1) had not sufficient maturity or soundness of mind to appreciate the nature and consequences of an oath, or to remember facts and to answer questions intelligently; (2) did not believe in God and in a future state of rewards and punishments; (3) would directly

[25] Thayer, Cases on Evidence (2nd ed.), page 2.

gain or lose by the judgment in the suit in which he was called.

Mental immaturity. There was no arbitrary age limit determining the competency of a witness at common law. The competency of children "depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court."[26]

Insanity. So, whether or not an insane person was competent was a preliminary question of fact for the court. The fact of insanity alone did not render a witness incompetent. If he remembered the event to which he testified, knew what an oath meant, and answered intelligently, he was competent.[27]

Interest. The parties to a suit and others interested in the event of a litigation were incompetent witnesses because it was feared that their interests in the suit might tempt them to disregard their oaths. In civil cases an interest which had this disabling effect must have been direct and pecuniary, that is, the witness must have had a money or property interest in the judgment to be rendered.[28]

137. **Same subject.**—Unless a witness was disqualified for mental immaturity, insanity, religious belief, or interest, he was generally competent at common law so far as the law of evidence affected the question. There were, however, other disabilities attached to witnesses by incidental considerations of

[26] The King v. Brasier, 1 Leach C. C. 199 (Eng.).

[27] Coleman v. Commonwealth, 25 Gratt. 865 (Va.).

[28] Adams, Admr. v. The Trustees of the Internal Improvement Fund, 37 Fla. 266.

policy and convenience defined in particular divisions of the substantive law. For example, one who stood convicted of an infamous crime was an incompetent witness; and the husband or wife of one who stood directly to gain or lose by the judgment in a suit was disqualified as a witness to testify in behalf of his or her spouse in that suit. Disabilities like these are sometimes treated as causes of incompetency created by the law of evidence, but the limitations upon such causes show the contrary. Infamous crimes are felonies and certain other offenses involving falsehood and fraud. Again, the rule disqualifying the husband or wife of a person who stood directly to gain or lose by the judgment in the suit operated to render only a lawful husband or wife incompetent as a witness, and so did not disqualify a mistress or either party to a bigamous marriage. Death or divorce, too, ended such incompetency. Thus, all causes of "special incompetency" of this kind proceed from rules of the substantive law by which alone they can be explained and understood; they are not produced by any rules of the law of evidence.[29]

138. **Same subject—Statutory modifications.**—The common law rule of evidence that a witness who did not believe in God and a future state of rewards and punishments was incompetent has today every-

[29] By rules of substantive law, grand and petit jurors also are disqualified in certain respects to testify as to what they said and how they voted in the jury room. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 284, note 1; page 285, note 1. It should be noticed, too, that rules requiring the corroboration of certain classes of witnesses to different degrees belong to various branches of the substantive law and not to the law of evidence.

where been abrogated by statute. A method of affirming witnesses has generally been established for those who may properly refuse to take an oath and the religious opinions of such a witness go to the weight and not to the admissibility of his testimony.

Mental immaturity or unsoundness. With respect to witnesses of insufficient maturity or soundness of mind to appreciate the nature of an oath or to recollect facts and answer questions intelligently the rule of evidence is the same as the common law rule previously stated.[30]

Infamous conviction. The rule of law disqualifying a witness who had been convicted of an infamous crime has now been done away with and such a conviction now affects only the credibility of such a witness.[31]

Marital relationship. The rule of law rendering the husband or wife of one who stood directly to gain or lose by the judgment in a suit incompetent as a witness for his or her spouse in that suit has practically everywhere been nullified by statute. By statute, however, in some jurisdictions, in proceedings founded upon an allegation of adultery, special disqualifications are imposed on such witnesses.[32]

Interest. The incompetency of other witnesses who stand directly to gain or lose by the judgment

[30] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 272, note 1.

[31] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 272, note 3.

[32] In New York a husband or wife is disqualified to testify against his or her spouse in such a proceeding, except to prove the marriage or disprove the adultery. New York Code of Civil Procedure, § 831.

in a suit also has been very generally removed by statute, and the interest of such a witness now affects only his credibility. Several jurisdictions have, however, enacted a rule providing that in civil cases a party or person interested in the event, or a person under whom such a party or interested person derives his interest, shall not be examined as a witness in his own behalf, or in behalf of the party succeeding to his interest, against a personal representative or survivor of a deceased person, or the committee of a lunatic, or a person deriving his interest from a deceased person or lunatic, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the personal representative, survivor, committee, or person so deriving interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.[33]

139. **The rule in the federal courts.**—The federal courts on questions of the incompetency of witnesses are governed in civil cases by the law of the state in which the suit was tried, unless some federal statute prescribes a different rule; in criminal cases, unless a federal statute prescribes otherwise, the federal courts are controlled by the law of the state where the prosecution occurred as that law existed when the state was admitted to the Union.[34]

140. **Privilege and incompetency distinguished.**—A witness is incompetent when he will not be allowed

[33] New York Code of Civil Procedure, § 829.
[34] Logan v. United States, 144 U. S. 263.

to testify; he is privileged when he need not testify unless he wishes. A privilege may be waived; incompetency cannot be waived.

141. **The privilege against self-incrimination.**—All who testify in a legal proceeding are privileged against self-incrimination. This rule of the law of evidence has been adopted by provisions of the United States Constitution and of the constitutions of practically all the United States, usually phrased to declare that "no person * * * shall be compelled in any criminal case to be a witness against himself."[35] But these constitutional clauses are merely declaratory of a principle theretofore defined by the common law and not extended or modified by them. Irrespective of how they may be phrased, therefore, the constitutional provisions in this matter exempt both witnesses and parties from self-incriminating testimony in both civil and criminal cases of every nature.

142. **Scope of the privilege.**—No person can be compelled without his consent to give testimony which would tend to expose him to a criminal prosecution, or to charge him with a penalty or a forfeiture, unless he is protected therefrom by the Statute of Limitations, by a pardon or by a statute extending to him complete immunity therefrom.[36] Where a person's testimony may tend to charge him

[35] United States Constitution, 5th Amendment.

[36] An independent privilege against testimony by a person as to facts immaterial to the issue, which tended to degrade him or render him infamous without incriminating him, has sometimes been confused with the privilege against self-incrimination. The former independent privilege was never constitutionally adopted and is no longer recognized. Wigmore, Evidence, § 2255.

with a debt, or to subject him to pecuniary loss or liability, he may not claim the privilege against self-incrimination.[37] But if the payment of money to which the testimony of the witness tends to subject him amounts to a penalty or forfeiture, the privilege, of course, protects the witness from disclosing facts tending to subject him to it. A person may refuse to testify, not only to the commission by him of a crime, but to every fact which is a necessary constituent of such a crime.

143. **Claim of the privilege by an accused.**—A person accused of crime knows that if he becomes a witness at all, he must be interrogated as to facts relevant to the crime for which he is on trial and that his answers to questions which are certain to be asked him, may tend to incriminate him. Therefore, such a person asserts the privilege against self-incrimination by refusal to take the witness stand. Although it cannot be known beforehand that an accused will avail himself of the privilege, the courts are so anxious to extend to him the whole value of it that the prosecution is not allowed to call him as a witness and to compel him to refuse to testify.

144. **Effect of assertion of the privilege by an accused.**—But if this privilege is to be of benefit to one accused of crime, as it was intended to be, certainly a jury ought not to be allowed to infer his guilt from his silence when he asserts the privilege, and for this reason it is frequently provided by statute that the failure of an accused to testify in his own behalf shall not furnish the basis for an infer-

[37] Bull v. Loveland, 10 Pickering 9 (Mass.).

ence against him.[38] These statutory regulations, that no adverse inference shall be drawn from the failure of an accused to testify for himself, soundly interpret the policy of the privilege; but the contrary rule obtains in New Jersey, where it is held that if a strong case is made out against an accused upon facts presumably within his knowledge and he does not undertake as a witness to disprove them, the inference that he cannot deny them is "natural and irresistible."[39]

145. **Waiver of the privilege by an accused.**—Where a person accused of crime voluntarily becomes a witness, how has his privilege against self-incrimination been affected thereby? Many answers have been made to the question. The general rule, and the sound one on principle, is that an accused, since he knows that questions upon any matter material to the charge against him must be asked, and that his answers may tend to incriminate him, by taking the witness stand without compulsion, waives the privilege completely, puts himself in the situation of an ordinary witness, and is subject to cross-examination as such.[40]

146. **Claim of the privilege by an ordinary witness.**—The ordinary witness asserts the privilege by refusing to answer a question which tends to incriminate him, not by objecting to such a question. The court, in its discretion, may advise a witness of

[38] Commonwealth v. Harlow, 110 Mass. 411. The failure to call an unprejudiced third person as a witness may, of course, be an admission by conduct in both civil and criminal cases.

[39] Parker v. State, 61 N. J. L. 308.

[40] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 297, note 1.

the privilege, but need not do so. The mere assertion of the privilege by an ordinary witness does not end the matter. The court must in each case decide in view of the probable character of the answer refused to be given and the scope of the evidence up to the time the privilege is claimed, this preliminary question of fact: Is the privilege properly claimed? "The court must see * * * that there is reasonable ground to apprehend danger to the witness from his being compelled to answer."[41]

147. **Assertion and waiver of the privilege by an ordinary witness.**—Wherever the answer of an ordinary witness, in either a civil or criminal case, divulges facts tending to incriminate him, he waives the privilege and must then fully disclose the whole matter to which the incriminating facts relate.[42] If the witness is a party to a civil action testifying in his own behalf, or is called as a witness by his adversary, his claim of the privilege cannot be made the basis for an inference against him. Where the witness who claims the privilege is not a party to the suit, either civil or criminal, no inference unfavorable to either party to the suit can on that account be drawn, because neither party can control the use of such privilege by the witness.

148. **Same subject.**—Unlike a person accused of crime, the ordinary witness in a case, civil or criminal, does not know in advance of taking the witness stand, that his answers to questions sure to be asked

[41] Cockburn, C. J., in Regina v. Bayes, 1 B. & S. 311 (Eng.). See also the remarks of Mitchell, J., in State v. Thaden, 43 Minn. 253.

[42] Foster v. The People, 18 Mich. 266, LEADING ILLUSTRATIVE CASES.

him, may tend to incriminate him. He knows only that he will be interrogated on matters in issue between the parties. Hence he may be compelled to take the witness stand in the first instance. But at any time before he has actually admitted either facts which directly incriminate him, or which are links in a chain of evidence tending to incriminate him, "the witness may unquestionably stop short, at any point, and determine that he will go no further."[43]

149. **When the privilege cannot be claimed.**—If the Statute of Limitations has barred a prosecution for an offense of which any witness's testimony would tend to incriminate him, or if all punishment for an offense is prevented by an executive pardon, the privilege cannot be claimed. Nor can a witness claim the privilege where his answers would tend to incriminate him in regard to an offense concerning which he is accorded absolute immunity by statute. No statute can have this effect unless the witness is completely protected by it. A statute which provides that incriminating testimony given by a witness cannot be used against him, does not destroy the privilege, for "it could not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property on a criminal proceeding."[44]

150. **Privileged communications.**—Communications made by one person to another while certain

[43] Foster v. The People, 18 Mich. 266, LEADING ILLUSTRATIVE CASES.

[44] Counselman v. Hitchcock, 142 U. S. 547. Real evidence is not within the privilege. Thus where, against his objection, a defendant was compelled to stand up in order that a witness might identify him, the privilege was held not to have been violated. People v. Gardner, 144 N. Y. 119.

confidential relations exist between them, the preservation of which is deemed to be for the best interests of the community, cannot be disclosed by the person receiving such communications without the other person's consent. Such communications are termed privileged communications.

151. **Communications between attorney and client.**—Communications between a client and his attorney, while the relation of attorney and client subsists between them, made for the purpose of procuring legal advice, are privileged. That is, the attorney, as a witness, cannot be asked what the client told him nor what he told the client; nor can the client, as a witness, be asked what he told the attorney, nor what the attorney told him.

152. **Scope of the privilege.**—The attorney must be acting in his professional capacity. If the communications are exchanged by an attorney and one for whom he acts as an agent or friend, they are not privileged. Nor are communications made in furtherance of a criminal or illegal design privileged, for the furtherance of such a design is no part of an attorney's business. It is not essential, however, that the attorney be formally retained, nor is the payment of a fee essential, and, in some jurisdictions, communications exchanged with the idea of entering into the relation of attorney and client are privileged. Legal advice must have been sought when the communications were made. Collateral facts like the name of a client, or whether a particular specimen of writing is the client's, or of the fact of the attorney's employment by the client, are not privileged. Communica-

tions between attorney and client made when a third party is present are not privileged, for the element of a secret confidence in the attorney is then wanting. If two parties go and consult an attorney together the communications are not privileged in suits between such parties, but are privileged in suits between such parties and strangers.

All facts communicated not privileged. Because communications made between attorney and client are privileged, it does not follow that all facts so communicated are also privileged. For example: Suppose the question to be whether A was at a particular place at a certain time; A, as a witness, could not be asked: "Did you tell your attorney you were there?" But he could be asked: "Were you there?" That is, the client cannot be compelled to disclose a communication between him and his attorney, but he can be forced to divulge the facts so communicated by a direct question as to those facts and not as to the communication made in regard to them.

153. **How the privilege is claimed and waived.**— The privilege belongs to the client. It is not the attorney's. It outlasts the relation of attorney and client and is not terminated by the death of the client. It may be asserted whether the client is a party to the cause upon which such a communication is attempted to be shown or not. It may be waived, however; but power to make such waiver is also the client's and not the attorney's. Neither the client's taking the witness stand, nor his calling his attorney as a witness, is a waiver of the privilege, unless the client testifies to a communication made between him

and his attorney, or the attorney with the consent of the client testifies to facts learned by him from the client in the capacity of attorney.[45]

154. **Communications between husband and wife.** —Communications between husband and wife, who are such by a lawful marital relation, are privileged. Any communication between husband and wife is presumed to be confidential, unless the circumstances under which it was made indicate the contrary, as where the communication is made in the presence of a third party. By statute, all communications made between husband and wife are privileged in some jurisdictions. The husband or wife who made the communication may claim or waive the privilege, and death or divorce does not destroy it.

Marital incompetency—Anti-marital privilege and privileged marital communications distinguished. At common law one spouse was incompetent to testify in behalf of the other when the latter stood

[45] The American cases on the subject of communications between attorney and client are collected in Stephen, Digest of Evidence (Chase's 2nd ed.), pp. 287-290, notes.

Communication between physician and patient necessary to enable the former in his professional capacity to prescribe for the latter, and between priest and penitent, made in the course of the performance of an office enjoined upon the former by the precepts of the religious order of which he is a member, are also generally privileged by statute. The privilege may, of course, be waived by the patient or penitent. Under some statutes, all communications whatever, made to a physician or clergyman, in their respective characters as such, are privileged, and there are limitations of varying tenor in other statutes. See Stephen, Digest of Evidence (Chase's 2nd ed.), the cases cited page 292, note 3.

State secrets and also the acts of grand and petit jurors (as to which such jurors are not incompetent to testify), and of arbitrators are privileged. Where the matter is a state secret, the privilege belongs to the government and not to the witness and may be waived only by the proper officer. Grand and petit jurors and arbitrators, also, may waive the privilege.

directly to gain or lose by the judgment in a cause; and in the same event both spouses were privileged not to testify against each other, irrespective of how the information of the spouse called as a witness was obtained. The reason for this last privilege was undoubtedly a desire to preserve full confidence and affection in the marital relation. Only lawful husbands and wives were protected by that privilege, which ceased when the marital relation was terminated either by divorce or death. Either spouse might claim that privilege and either might waive the same. The assertion of it was the basis for no inference against the spouse who claimed it. It necessarily did not apply in a class of cases grounded upon bodily injuries inflicted by one spouse upon the other. The extent to which that privilege exists today is a matter regulated by statute in all jurisdictions. The privilege protecting communications between husband and wife made in the marital relation, is to be distinguished from that protecting either spouse from testifying against the other, in that the latter covers all information, however it is obtained, whereas the former affects only those communications made by virtue of the marital relation.[46]

155. **The examination of witnesses.**—There are generally three stages in the conduct of the trial of a lawsuit, the opening, the defense, and the rebuttal. The party on whom rests the burden of establishing a proposition upon which the parties to a suit are at issue, who in most cases will be the plaintiff, must, first of all, proceed with proof of that proposition,

[46] Wigmore, Evidence, §§ 2227, 2234 (2), 2245.

that is, he must show the facts constituting his cause of action. This stage of the suit is called the opening. This done, the adversary, unless he would have judgment against him, must take up the burden of going forward with evidence to make out his answer thereto, and this stage of the suit is called the defense. The party who must sustain the burden of establishing a proposition in issue may then assume the burden of going forward with evidence to repair his affirmative case wherein the defense has damaged it. This last stage of the suit is called the rebuttal.

156. **Direct examination—Cross-examination—Re-examination.**—In each one of these stages of a trial witnesses may be subjected to three forms of examination. Witnesses are first called by the party on whom rests the burden of establishing a proposition in issue, unless at the outset a presumption or admission relieves him of the burden of going forward with evidence. A witness is first sworn or affirmed. The party who calls the witness then examines him. The initial interrogation of a witness is called the examination in chief, or direct examination. The witness is then questioned by the adversary. This questioning is called the cross-examination, and, when the adversary avails himself of it, the party who called the witness may again examine him. This last interrogation is called the re-examination.

157. **Personal knowledge defined.**—As a general rule, facts sought to be shown by a party through the testimony of a witness called by him must be testified to orally by the witness of his personal knowledge to the tribunal before which he is called.

But in the nature of things, it is plain that there must be qualifications upon such a principle. Knowledge is acquired as the result of impressions made by external objects upon the sense organs of the body and the operation of reasoning thereon. The point at which sensation ceases, and the process of reasoning begins, cannot be defined. The witness must testify to facts made known to him by his senses, not to impressions received secondhand from others. In other words, he must have had the means of observing personally the facts he would relate. So long as he has had a sufficient opportunity personally to observe the facts to which he would testify, and his statement is not within the rule excluding opinion evidence, it may be said that a witness speaks of his personal knowledge.

158. **Refreshing recollection.**—When a witness takes the stand a considerable time may have elapsed since the happening of the facts he is called to communicate to the tribunal. Obviously, then, it is not enough that at the time these facts occurred the witness had a sufficient opportunity personally to observe them. He must also adequately recollect them at the time he tells his story on the witness stand. The impression made upon his memory by the happening of these facts may in the intervening time have been dimmed to such an extent that he no longer knows those facts. Again, he may no longer recollect them with positive assurance, but may still "think" he knows them. To what point must a witness bring his recollection before a legal tribunal will listen to him? The trial court must answer that question

upon the particular circumstances under which it is put in each case. The witness need not be positively sure that he recollects with absolute correctness. The degree of his doubt goes to the weight of his testimony with the jury. Thus a witness's statement that he had a "strong impression" as to a certain fact, was received.[47]

A witness who, at the time he takes the witness stand, has no present recollection of the transaction he is called to relate, may still be useful if he has, at a prior time, made an artificial record of a recollection which was satisfactory when it was recorded. The uses of a record of such a character have been thus described: "(1) A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed; and when his memory has been refreshed he must testify to the facts of his own knowledge, the memorandum itself not being evidence. (2) When a witness has so far forgotten the facts that he cannot recall them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum in his own handwriting may be received as evidence of the facts therein contained, although the witness has no present recollection of them."[48] The adversary has the right to inspect the writing and to cross-examine the witness upon it.

[47] Clark v. Bigelow, 16 Me. 246.

[48] Howard v. McDonough, 77 N. Y. 592. Anomalies in the use of memoranda to refresh the recollection of a witness peculiar to the different jurisdictions are stated, Wigmore, Evidence, § 736.

159. **Discretion of the court.**—The order in which matters shall be inquired about upon the trial of a legal proceeding, and the circumstances under which the interrogation of witnesses shall there be pursued, are controlled somewhat by the discretion of the trial court. A trial judge, for example, may reopen a case at any time before the verdict to allow either party to offer evidence which has been inadvertently omitted,[49] or during the examination of a witness the court may exclude other witnesses from the court room to prevent them from being prejudiced by hearing the testimony of such witness and thereby biased in giving the testimony which is to follow. Parties and their counsel, however, cannot be removed from the court room for such a reason. A witness who refuses to leave the court room when directed to do so by the judge, may be fined for contempt.[50] A trial judge also has the right to bring to the witness stand a witness called by neither party, and to examine him, and may refuse to permit either party to cross-examine a witness so brought to the stand, unless the latter has given material testimony.[51] The exercise by a tribunal of its discretion in these matters is not subject to review on appeal, unless it has been clearly abused.

160. **The examination in chief.**—The object of the direct examination of a witness is to elicit from such witness all facts which are favorable to the party calling him, that is, which tend to prove such party's

[49] State v. Martin, 89 Me. 117.

[50] See the cases cited, Thayer, Cases on Evidence (2nd ed.), page 1198, note 2.

[51] Coulson v. Disborough (1894), 2 Q. B. 316 (Eng.).

case. Questions which directly suggest to a witness the answer desired and lead him to make it by assuming the existence of a fact neither established nor conceded and calling for a categorical answer, are not permitted to be put to a witness on his direct examination, when objected to by the adverse party. For example: "You saw the defendant running down the street after A was killed?" is objectionable for this reason. Interrogations of this character are called leading questions.

161. **Leading questions—When not objectionable.**—But leading questions are not objectionable where the answer called for by such a question is material only as introductory to evidence of a matter upon which the parties to a suit are at issue. Thus, a question as to the name or residence of a party, even when put in a leading form, is not objectionable where such facts are not material to the issue. Nor are leading questions objectionable where the witness appears to be hostile to the party who called him; nor where the matter inquired about is so full of detail that suggestions may properly be made to aid the memory of a witness. Other circumstances of a similar nature may induce a trial court, in its discretion, to allow a leading question to be put, and the exercise of discretion by a court in this respect is not error in the absence of a manifest abuse of such discretion.[52]

162. **A party cannot impeach his own witness.**—When a party calls a witness, he asks the tribunal,

[52] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 319, note 1.

before which the witness is called, to listen to the latter as one entitled to be believed. When, therefore, the testimony of a witness is unfavorable to the party who produces him, that party cannot subsequently show to the tribunal that the witness is not worthy of credit, for it is presumed that the party knew the character of the witness, and the former must, therefore, take his chance as to what is testified to by his witness, or make no use of him at all.[53] Where a party is required by law to call a witness, e.g., a subscribing witness, the foregoing rule is inapplicable, for such a witness cannot be said to be the witness of the one who produces him.[54] Nor does the rule preclude a party from disproving the testimony of his witness by other evidence, even though the incidental effect of such other evidence is to discredit the party's witness.[55] Again, "It is only evidence offered for the mere purpose of impeaching the credibility of the witness which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. In case he should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses; but where the questions as to such statements are confined to the witness himself,

[53] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 329, note 1.

[54] Idem.

[55] Idem.

we think they are admissible. As a matter of course, such previous unsworn statements are not evidence, and when the trial is before a jury that instruction should be given."[56]

163. **Cross-examination.**—The right of a party to cross-examine witnesses called by his adversary is regarded by the common law as so important that "no evidence should be admitted but what was or might be under the examination of both parties."[57] So where a witness who has been directly examined on the trial of a common law action, dies before there has been an opportunity to cross-examine him, his testimony on the direct examination must be struck out.[58]

164. **Scope of cross-examination.**—By the great preponderance of American authority, the cross-examination of a witness must be directed only to matters brought out on the direct examination of the witness.[59] If a witness is cross-examined concerning matters wholly independent of the facts brought out on his direct examination, the cross-examiner to the extent to which new matters are thus introduced by the witness on cross-examination, makes the witness his own.[60]

165. **Leading questions unobjectionable on cross-examination.**—Leading questions are not objection-

[56] Per Rapallo, J., in Bullard v. Pearsall, 53 N. Y. 230. The attention of the witness must first be definitely directed to the time and place at which the prior inconsistent statements were made.

[57] Per Grover, J., in People v. Cole, 43 N. Y. 508.

[58] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 316, note 1.

[59] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 317, note 1.

[60] Idem.

able on cross-examination because the object of cross-examination is to test the value of the witness, and not to bring out new facts favorable to the cross-examining party, but where the cross-examination of a witness goes into subjects not touched upon in his direct examination, leading questions can no longer be put to him, even on cross-examination, for the witness is then being subjected to a direct examination under the guise of cross-examination and the cross-examiner has thereby made him his own witness. If, however, the cross-examination of a witness does not exceed the limits of his direct examination, the witness represents the party who called him throughout both examinations, and the evidence given by the witness on both examinations is deemed to be that of the party who called him.[61]

166. **Impeachment by cross-examination.**—"The credit of a witness may be impeached either by cross-examination * * * or by general evidence affecting his credit, or by evidence that he has before done or said that which is inconsistent with his evidence on the trial; or, lastly, by contrary evidence as to the facts themselves."[62] Either party has the right to show that a witness of the adverse party is unworthy of credit by any one of these means, and one of the most important uses of cross-examination is its employment for this purpose to bring out the ignorance, untruthfulness, lack of memory, or bias of a witness called by the adversary. In this respect, cross-examination knows no limit but the discretion

[61] Stephen, Digest of Evidence (Chase's 2nd ed.), page 317, note 1.
[62] 3 Starkie, Evidence (Metcalf's ed.), side page 1753.

of the court. If, however, a party has exceeded the proper bounds of cross-examination before he attempts to impeach a witness by the use of it, he cannot subsequently employ it for that purpose; the witness is then his own.

To show immaterial facts degrading the witness. To damage his credibility a witness may be cross-examined even as to particular facts which have a tendency to degrade him, and are wholly immaterial to the proposition upon which the parties are at issue.[63] Thus a witness on cross-examination may be asked if he has ever been in jail, and, if so, why he came to be there.[64] At common law the right on cross-examination, over objection, to ask a witness if he had been convicted of any crime, was denied on the ground that the record of the conviction was the best evidence of it.[65] By statute, in most jurisdictions today, conviction of the witness of any crime may be proved by his testimony on cross-examination.[66] Questions demanding that the witness tell whether or not he has ever been accused, indicted, or arrested for crime, are objectionable on the ground that they have no tendency to prove guilt of the crimes involved, and thus do not discredit the witness.[67]

To show favor or bias. The favorable disposition

[63] South Bend v. Hardy, 98 Ind. 577.

[64] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 323, note 1.

[65] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 325, note 1.

[66] Idem.

[67] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 320, note 2.

of a witness toward the party who called him, or to that party's side of the case, or the bias, prejudice or malice of the witness against the adversary, may be shown by cross-examination of the witness for the purpose of impeaching him.[68] Thus the close relations of a principal witness for the defense with the accused were allowed to be shown by the cross-examination of the former on the trial of the latter upon an indictment for murder.[69]

Immaterial answers cannot be contradicted. Under the broad rule of the law of evidence excluding matters which tend unduly to multiply the issues and drag out the trial, the answers of a witness upon matters collateral to the issue, inquired about on cross-examination to impeach the witness, are binding on the cross-examiner. In a word, a witness cannot be contradicted on a collateral matter. Thus, where a witness was asked, on cross-examination to impeach her, whether she did not steal certain articles from a former employer, and denied the charge, it was incompetent to prove the falsity of her denial by another witness.[70] But if a witness denies, on cross-examination to impeach him, that he was convicted of a crime, in those jurisdictions where by statute it is not objectionable to cross-examine a witness on that point, the statutes generally provide that the answer of the witness denying his conviction may be contradicted.[71] So the answers of a

[68] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 320, note 2.

[69] People v. Webster, 139 N. Y. 73.

[70] Stokes v. People, 53 N. Y. 164.

[71] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 325, note 1.

witness who denies, on cross-examination to impeach him, the existence of facts showing his favor, bias, prejudice, or malice, toward either party, may be contradicted, since these facts are always deemed material.[72]

To show inconsistent prior statements. Upon the cross-examination of a witness to impair his credit, questions are not objectionable which call upon the witness to say whether or not he has previously made statements inconsistent with his testimony, if a foundation for such questions has first been laid by directing the attention of the witness to the time and place at which, and the person to whom, or in whose presence, the inconsistent statements were made. If the witness admits making such an inconsistent statement and fails to account for the discrepancy between it and his testimony, a basis has been supplied for an inference that he is not to be believed. Should he deny making such a statement, since the matter is not collateral, evidence to contradict his denial is admissible. Where the cross-examination to impeach a witness relates to prior inconsistent statements made by the witness in writing, the writing must first be shown the witness for identification, and, if he admits that he is the author of it, it must be read in evidence before he can be cross-examined as to its contents. This practice is unsound on principle, and is not the law of England,[73] but is followed generally in this country.

[72] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 325, note 2. The general rules governing the cross-examination of witnesses apply to all witnesses, including defendants in criminal cases.

[73] See Stephen, Digest of Evidence (Chase's 2nd ed.), Art. 132.

Re-examination. When a party has cross-examined a witness of his adversary, the latter may re-examine the witness to explain away doubts created by the cross-examination and to bring out reasons for answers made by the witness on cross-examination, which reasons on that examination were not made to appear. Beyond this a re-examination cannot go of right, but the court, in its discretion, may permit it to be further extended.[74]

[74] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 318, note 1.

NOTE.

When the witness of an adversary is impeached by evidence affecting his general credit, that evidence must in general be as to the badness of the general reputation of the witness for veracity in the community where the witness lives. (See the cases cited, Stephen, Digest of Evidence [Chase's 2nd ed.], page 334, note 1.) Where this method of impeaching a witness is resorted to, the general reputation of a witness for veracity in the community where the witness lives may be shown to be good by the party who called the witness, by other witnesses called for that purpose. (See the cases cited, Stephen, Digest of Evidence [Chase's 2nd ed.], page 336, note 3.) The impeaching witness may be cross-examined as to his knowledge of the general reputation for veracity of the impeached witness in the community where the latter lives, and also as to his unfavorable disposition toward the latter.

PART III

TOPICS RELATING TO THE LAW OF EVIDENCE

CHAPTER XI.

JUDICIAL NOTICE.

167. **The doctrine explained.**—A legal tribunal first, by the rules of pleading and by the rules of the various branches of the substantive law, determines what are the ultimate facts in a case, and, by its sound sense and good judgment, what other facts are evidential of the ultimate ones; but all such facts do not have to be proved in every case by evidence. Evidence is merely a foundation for the process of reasoning and the assumption of many things without proof of them is indispensable to the conduct of the reasoning process. Accordingly, when a legal tribunal makes use of reasoning, many things that supply a basis for the operation of the reasoning process need not be furnished the tribunal because they are assumed to be in its possession; and others need not be supplied because they are actually in the tribunal's possession, or are so easy of access that they need not be the subject of proof unless the tribunal desires it. Whenever the existence of a fact, which is disputed before a legal tribunal, need not

be the subject of proof, for any of these reasons, it is said to be judicially noticed.

168. **Relation of the doctrine to the law of evidence.**—It is customary to treat the doctrine of judicial notice as parcel of the law of evidence, but that doctrine finds application in the law of evidence only because evidence is the basis of judicial reasoning, and reasoning, in the nature of things, cannot go on unless a large number of matters are assumed to exist without proof of them.

169. **Matters judicially noticed.**—Broadly speaking, legal tribunals must judicially notice things which by statute they are required so to notice; also things which they have been accustomed so to notice; and things which, as officers of a court of law, they are presupposed to know. They may judicially notice "what everybody else knows."[75]

Matters required by statute to be judicially noticed. When the question is whether or not a statute requires a thing to be judicially noticed the tribunal must turn to the statute for an answer. Matters so required to be noticed by statutory law generally relate to the form and authenticity of public records and other public documents.

Matters accustomed to be judicially noticed. The decisions in the different jurisdictions furnish examples of the kind of facts that legal tribunals are accustomed to notice judicially. Thus public proclamations by the executive branch of the government of which the court is a part, treaties of that government with foreign nations, and its relation with such

[75] Commonwealth v. Peckham, 2 Gray 514 (Mass.).

countries, the official acts of prominent public officers and the like, are facts of which the court, by custom, takes judicial notice.

Matters judicially noticed because the court must know them. The extent of their jurisdiction, the general principles of the law administered by them, the rules of procedure which obtain in trials before them, the rules of grammar and reasoning, things occurring in the usual course of nature, or things which men of ordinary habits and physical powers do under circumstances of frequent occurrence, are matters which tribunals must know in order properly to perform their functions and, hence, are required to notice judicially.

Matters judicially noticed because everyone knows them. The matters which legal tribunals may notice on the ground that no one is ignorant of them, address an inquiry to the discretion of the court in all cases. There is no unyielding rule by which this matter can be determined. Jurors have been allowed to find that gin is intoxicating without proof of that fact.[76] On the other hand, a court will not take judicial notice of a thing because it is very likely to be true. Thus a court has refused to notice that a note dated "Dublin" means necessarily a note dated Dublin, Ireland, for to do this would be "to take judicial notice that there is only one Dublin in the world."[77]

170. **Judicial notice establishes a fact only prima facie.**—A thing judicially noticed is established only prima facie, and may still be shown to be otherwise.

[76] Commonwealth v. Peckham, 2 Gray 514 (Mass.).
[77] Kearney v. King, 2 B. & Ald. 301 (Eng.).

It is undeniable, too, that a tribunal often judicially notices a matter concerning which it is wholly uninformed. In that event, the tribunal may instruct itself in private concerning the matter, or may require the assistance of counsel for that purpose.[78]

[78] The matters which the courts of this country judicially notice are stated in detail in the notes to Stephen, Digest of Evidence (Chase's 2nd ed.), Art 58. The United States Circuit Courts take judicial notice of the laws of all the states. (Owings et al. v. Hull, 9 Peters [U. S.] 607.) The United States Supreme Court in its original jurisdiction, and its appellate jurisdiction from the federal Circuit Courts, judicially notices the laws of all the states. In its appellate jurisdiction from the state courts, the United States Supreme Court follows the rule of the state court from which the appeal is taken—if that court judicially notices the laws of all the states, the United States Supreme Court will do so in the case; if the state court from which the appeal is taken requires the law of another state to be proved as a matter of fact, the United States Supreme Court will so regard it in the case. Hanley v. Donoghue, 116 U. S. 1, LEADING ILLUSTRATIVE CASES.

CHAPTER XII.

PRESUMPTIONS.

171. **The doctrine explained.**—Legal tribunals have so often inferred the existence of a particular fact, from certain sets of frequently recurring other facts, that they have gradually laid down rules ascribing a prima facie consequence to the mere presentation of such other facts. Such a rule is called a presumption. Presumptions are not part of the law of evidence. They are in general short cuts in the process of reasoning by which, this and that group of facts appearing, the existence of some other fact is taken for granted. Sometimes they are also rules of procedure merely, which are established for convenience in carrying on trials.[79]

172. **Effect of a presumption.**—A presumption merely operates as a prima facie assumption that a certain fact is true and the existence of the fact thus assumed may be rebutted. It follows, then, that the complete effect of a presumption is to put upon him against whom it operates the burden of going forward with evidence to show that the fact whose existence is taken for granted by virtue of the presumption does not exist. This is the whole function of a presumption. Once rebutted, the presumption disappears. The facts which, by their presentation,

[79] Moore v. New York, etc., R. R. Company, 173 Mass. 335, LEADING ILLUSTRATIVE CASES.

gave rise to the presumption may, of course, still operate as evidence of the fact formerly presumed, but the inference must be drawn in the usual way. For example: It is a rule applicable to all branches of the law that every man is presumed to be sane. That rule puts upon a contestant disputing the validity of a will on the ground of the insanity of the testator at the time of execution, the burden of going forward with evidence to establish such insanity. Suppose the contestant meets the burden sufficiently to create an even balance of evidence upon the question of the sanity of the testator at the time the will was made. The presumption is then rebutted and disappears. It has exhausted its function and cannot be weighed as evidence with other facts in the case bearing upon the question of the insanity of the testator in determining that question.[80]

173. **Presumptions are matters of substantive law.**—The rules affixing a prima facie consequence to certain sets of facts generally belong to those branches of the substantive law defining rights, duties, and liabilities in respect to the facts raising a particular presumption. The illustrations are so numerous as to permit of the mention of only a few. In sales, where the terms of a bargain relating to an ascertained chattel are agreed upon, the property in the chattel is presumed to pass. In crimes, a voluntary killing, unexplained, is presumed to be murder. As to persons, one absent seven years without information concerning him being received by

[80] Sutton v. Sadler, 3 C. B. (N. S.) 87 (Eng.). Sturdevant's Appeal, 71 Conn. 392, contra, has been overruled.

those who are likely to have heard of him is presumed to be dead;[81] so, too, children begotten in lawful wedlock are presumed to be legitimate. A presumption may, however, be one that is applicable to all branches of the substantive law. This is illustrated by the prima facie rules that all men are presumed to be sane, and that persons engaged in any business are presumed to act in accordance with their duties. Here again the list of examples might be greatly lengthened.

So-called conclusive presumptions. Judicial legislation has, in some instances, extended itself to attach to certain groups of facts an irrebuttable effect to which, not unnaturally, the term "presumption" has inaccurately been applied. For example: Where an easement of real property has been used adversely for twenty years or more, the rightful owner of such property may not interfere with such user. What is often said is that the adverse user is conclusively presumed to have had a grant of such easement and to have lost it. Similarly a writing not less than thirty years old at the time of a trial upon which it is used as evidence is said to be conclusively presumed to have been executed by the parties to it. These are simply rules of law. They are not presumptions, for evidence to show that the facts "presumed" by them do not exist is inadmissible.

[81] But a person absent for seven years under such circumstances is not presumed to have died at the end of the seven years. Nor is he presumed to have died at any other time. That is, the fact of death is presumed but not the time of its occurrence. Nepean v. Doe d. Knight, 2 M. & W. 894 (Eng.).

Other inaccurate notions concerning presumptions. Again the term "presumption" is sometimes applied inaccurately to a bare inference. "When life is once shown it is presumed to continue until it is shown to have ended."[82] Life once shown may be the basis for an inference that it still exists at some other time and nothing more. But this inference is stronger or weaker according to the amount of time that has elapsed since life was shown to have existed, and may be affected by other circumstances. Moreover, presumptions are oftentimes said to be "strict" when the fact is that some independent rule of that division of the substantive law to which a given presumption belongs, requires a higher or greater degree of evidence to rebut it, e. g., the presumption of the legitimacy of a child born in wedlock must be rebutted beyond a reasonable doubt. All this serves to show how little the law of evidence has to do with the subject of presumptions. "But the essential character and operation of presumptions, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or the other; that is to say, they throw upon the party against whom they work the duty of going forward with evidence, and this operation is all their effect, regarded merely in their character as presumptions."[83]

[82] This charge of a trial court is commented upon in State v. Plym, 43 Minn. 385.

[83] Thayer, Cases on Evidence (2nd ed.), page 43. Ingenious attempts have unsuccessfully been made to establish presumptions as to the order of the deaths of persons perishing in the same disaster. "By the law (the common law) where several lives are lost in the same disaster there is no presumption of survivorship by reason of age or sex; nor is it presumed

that all died at the same moment. Survivorship in such a case must be proved by the party asserting it. No presumption will be raised, by balancing probabilities, that there was a survivor or who it was.'' McSherry, J., in Cowman v. Rogers, 73 Md. 403. Where survivorship in such a case fails of proof the case is decided as if all had perished at the same moment (Newell v. Nichols, 75 N. Y. 78), and this rule has found expression in terms of a presumption that they die at the same time. See cases cited in Newell v. Nichols, supra.

CHAPTER XIII.

BURDEN OF PROOF.

174. **The burden of establishing a proposition.**—The words "burden of proof" have been used indiscriminately to describe two very different duties of the parties to a lawsuit. Suppose, for example, A sues B to recover the value of services rendered by him to B, and B, by his answer, denies liability. Here A asserts that B owes him for services rendered and B denies it. It results that A and B are at issue on that proposition.[84] Such a situation happens, expressly or by implication, in all legal proceedings, generally through the medium of the pleadings, and he who thus affirms a proposition on which the parties are at issue in a given case must make good his contention in that respect. This duty, i. e., the duty of establishing a proposition upon which the parties to a legal proceeding are at issue, has been described as the burden of proof.

175. **The burden of going forward with evidence.**—Assume now, in the case supposed, that A shows that the services were rendered. B now must act or judgment will be against him. Suppose B presents evidence to show an agreement whereby the services rendered to him by A were to be rendered gratuitously. Now A must act again or he cannot have the judgment he asks. He may present evi-

[84] Hingeston v. Kelly, 18 L. J. Exchequer 360 (Eng.).

dence negativing the existence of the agreement alleged by B. So in the trial of every lawsuit this necessity of going forward with evidence is first upon one party, then upon the other, then back once more upon the party who sustained it first, and so on. This duty, i. e., the duty of going forward with evidence in a trial, has also been described as the burden of proof.

176. **The burden of proof defined.**—In its proper sense the burden of proof means the duty of establishing a proposition upon which the parties to a legal proceeding are at issue and it never shifts; that is, only one of the parties must sustain it and that one must bear it throughout the whole proceeding.

177. **Operation of the burden of proof.**—How is it to be known which party is so encumbered? Sometimes this must be learned from the pleadings, sometimes by a rule of some branch of the substantive law,[85] and sometimes by both, but never by the law of evidence. It is enough to say that by some or all of these means, expressly or impliedly, in every legal proceeding, the parties arrive at a point where one affirms a proposition which the other denies, and the burden of making out that proposition is at all times upon him who affirms it. The plaintiff is not always that party. Assume now in the case sup-

[85] For example, the rule in crimes that guilt must be established by the prosecution beyond a reasonable doubt; and those of many branches of the substantive law requiring more than a preponderance of evidence to establish a proposition on which the parties to a proceeding are at issue. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 237, note 2.

posed that B pleads that he has paid A the agreed price of the service. Then the parties have not got the proposition with which they started, but a different proposition, namely, that B extinguished the claim sued for. This B affirms and A denies. The burden of establishing the proposition upon which A and B are at issue is in that event upon B. So the burden is always on a defendant who admits the proposition alleged by a plaintiff, either expressly or by his failure to deny it, and pleads other facts as an affirmative answer for it. But the burden of proof has not shifted. In the case last supposed there was but one proposition to be established, i. e., that B had paid A the value of the services sued for, and the burden of establishing it was upon B from the beginning.

178. **Same subject.**—In some instances it is less clear that the burden of proof does not shift. Under modern code pleading the pleadings seldom go beyond the defendant's statement of his answer to the plaintiff's statement of claim.[86] The result, therefore, often is that a plaintiff, without having replied to the defendant's answer upon the trial, may present any facts which would show that an affirmative proposition alleged in the defendant's answer constitutes no defense to the plaintiff's action. Under these circumstances what is the proposition upon which the parties are at issue may not appear until the trial, but the burden of establishing it is, nevertheless, on the party who affirms it and this never shifts. It may be added that when a defendant relies upon a negative plea and nothing else the burden of

[86] Dambmann v. Schulting, 51 How. Pr. Repts. 357 (N. Y.).

proof in its proper sense is upon the plaintiff. The fact that the affirmative of a proposition on which the parties to a proceeding are at issue involves the assertion of a negative does not affect the burden of proof. Thus, in actions for malicious prosecution, the plaintiff must show that the prosecution was instituted without reasonable cause.[87]

179. **Operation of the burden of presenting evidence.**—Since the burden of going forward with evidence in a trial shifts from one party to the other it is to be ascertained in every proceeding upon whom this duty rests in the first instance and just when it shifts thereafter. "The test * * * is simply this: To ask one's self which party will be successful if no evidence is given or if no more evidence is given at a particular point of the case."[88] The party who has the burden of establishing a proposition upon which the parties are at issue, then, must at the beginning bear both burdens, for "if no evidence is given" his case fails. Just when he has sufficiently met the burden of going forward with evidence and just when his adversary has put it back upon him are questions of fact to be decided by the trial court in every case. The law of evidence does not take upon itself the answering of them.

180. **Effect of a presumption on the burden of proof.**—Since a presumption operates to shift the burden of going forward with evidence upon the party against whom it operates, it will often relieve the other party of that burden for a time. Since

[87] Abrath v. The North Eastern Railway, 11 Q. B. D. 440 (Eng.).
[88] Per Bowen, L. J., in Abrath v. The North Eastern Railway, supra.

the party who has the burden of establishing a proposition upon which the parties are at issue has also the burden of going forward with evidence in the first instance, a presumption may relieve him of the latter burden at the beginning, but it does not shift the former burden. When his adversary has rebutted the consequence of a presumption the party in whose favor the presumption operated must outbalance the evidence by which his adversary overcame the effect of the presumption, and the burden of establishing the controverted proposition is with him to the end. For example: A maintains and B denies that C is sane. A has the burden of establishing the proposition that C is sane and also would have to go forward with evidence to establish it if the presumption of sanity did not dispense with his performance of that duty. B presents evidence that rebuts C's presumed sanity. A goes forward with enough evidence to counteract the rebutting evidence. The presumption has now disappeared. The question upon all the evidence is, is C sane? and A still has the burden of establishing that proposition.

CHAPTER XIV.

ADMISSIONS.

181. **Confessions and admissions distinguished.**—A confession is a direct acknowledgment by a person that he is guilty of a crime. A statement or conduct of a person which is damaging to his interests but which does not amount to a direct acknowledgment of such guilt is an admission.

182. **The nature of an admission.**—If the question is: Did A strike B? and A expressly states that he did, A's statement may be the basis for an inference that he struck B, but its probative force is certainly weaker for the purpose of judicial reasoning than another quality apparent in it. That quality is best defined by stating the effect of it: A party who admits doing a thing, when such admission is adverse to his interests, cannot object if it is assumed that he did do the thing. When, therefore, evidence of an admission is received, the legal tribunal which allows it in evidence says to him who made the admission: "Since you have conceded this to be the fact we will so regard it." That is to say, an admission once shown[89] is not so much evidence of the fact admitted as it is a substitute for proof of that fact. It is not material, therefore, whether

[89] Of course, evidence of the making of an admission may be only the basis for an inference that the admission was in fact made; that is, the means by which the admission is proved must be believed by the tribunal.

facts admitted are within the knowledge of the person who makes the admission or not, for admissions, because of their peculiar character as substitutes for proof, should not be regarded as hearsay.[90]

183. **When admissions may be shown.**—Evidence of statements or of conduct of a person detrimental to his interests is inadmissible unless that person is a party to the record or, by some rule of the substantive law, is so identified in interest with a party to the record that his statements or conduct detrimental to the interests of the person bind the latter.

184. **Solemn admissions.**—An admission made upon the record in a case is called a solemn admission. When, for example, counsel in a suit have entered upon a record a stipulation by which the existence of material facts is assumed, the existence of those facts is solemnly admitted. So the existence of facts stated in a material allegation in a pleading is solemnly admitted where the following pleading does not deny it. Where, too, the whole or part of an amount sued for is paid into court by the defendant, the facts that the plaintiff has capacity to sue and that the amount paid into court is owed him by the defendant are solemnly admitted.[91]

185. **Unsolemn admissions.**—An unsolemn admission is an admission made not upon the record in a case, but by declarations or conduct outside such record. Thus the refusal of a party, upon proper notice, to produce a written contract which ad-

[90] Reed v. McCord, 18 App. Div. 381 (N. Y.).

[91] See 1 Greenleaf, Evidence, § 27, quoted in Thayer, Cases on Evidence (2nd ed.), page 111.

mittedly defined the relations between the parties is an admission by conduct that the contents of the contract are favorable to that party's adversary.[92] The flight of one accused of crime is an admission by conduct of his guilt.[93] So, often a statement made in the presence of a party may be proved as a foundation for showing the conduct of the party at the time the statement was made, e. g., that he silently acquiesced in what was said when the circumstances were such as naturally to call upon him to reply or explain.[94]

186. **Admissions, when final.**—Solemn admissions are final for all purposes unless they are made solely for the purpose of a particular trial, when they are final only in the case tried.[95] Unsolemn admissions are final when the party making them has thereby acquired an advantage he cannot restore or has induced another, in reliance upon such an admission, to enter into a situation from which withdrawal without damage is impossible. That is to say, unsolemn admissions are final when they are tantamount to estoppels; otherwise, they may be explained or shown to have been mistakenly made.

187. **Admissions of parties to a record.**—"A party's own statements and admissions are in all cases admissible in evidence against him, though such statements and admissions may involve what

[92] Wylde v. Northern R. R. Company of N. J., 53 N. Y. 156, 163.

[93] Allen v. United States, 164 U. S. 492.

[94] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 25, note 1.

[95] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 57, note 1.

must necessarily be contained in some writing, deed, or record. * * * The general principle as to the production of written evidence as the best evidence does not apply to the admissions of parties, as what a party admits against himself may reasonably be taken to be true."[96] The foregoing represents the commoner and better rule.[97]

188. **Admissions of persons not parties to a record.**—When admissions of persons not parties to the record are received it is because some rule of the substantive law makes the admission of such person binding upon a party to the record on account of identity of interest. Thus by the law of agency the admissions of an agent made while acting within the scope of his authority are admissible against his principal in both civil and criminal cases if the principal is a party to the record.[98] By the law of real property, the admissions of former owners of real estate made during their respective ownerships and in relation thereto are admissible against any of their privies in title when the latter is a party to the record.[99] By the better view there is no similar rule in the law of personal property. The admissions of prior holders of negotiable paper, by the law of bills and notes, are everywhere inadmissible against a party to the record who purchased a bill or note for value before maturity. In some jurisdictions they are likewise inadmissible against

[96] Per Fletcher, J., in Smith v. Palmer, 6 Cushing 513 (Mass.).

[97] Sherman v. The People, 13 Hun 575 (N. Y.).

[98] United States v. Gooding, 12 Wheaton 460 (U. S.). The fact of agency must first be established by independent means.

[99] Woolway v. Rowe, 1 A. & E. 114 (Eng.).

a party purchasing such an instrument after maturity, but the weight of authority is to the contrary.[1]

189. **The rule in conspiracy cases.**—By various rules of the substantive law admissions of any conspirator made in furtherance of a common purpose, civilly or criminally wrongful, are admissible against his co-conspirators if the fact of the wrongful conspiracy is first shown by independent means.[2] Admissions of a conspirator made after the wrongful conspiracy terminates are inadmissible against his co-conspirators, but not against the conspirator making such an admission.[3] An interesting question arises in cases where a wrongful act charged must have required the participation of more than one party and the only proof of its commission is the uncorroborated admission of one of the parties made after the wrongful act was performed. The rule seems to be that where the act was joint and the issue is joint, judgment must be against all parties or none;[4] but where, although the act was joint, the issue is several, judgment may be rendered against

[1] Paige v. Cagwin, 7 Hill 361 (N. Y.). See also the cases cited, Thayer, Cases on Evidence (2nd ed.), page 126, note 1.

[2] See the cases cited Stephen, Digest of Evidence (Chase's 2nd ed.), page 14, note 4.

[3] See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 15, note 1.

[4] "The farthest the courts have gone is to allow one of the parties to be tried by himself and convicted, and then judgment is given against that party, because, as to him, the guilt of the other party is found as well as his own. But when the one has been previously tried or acquitted, or when both are tried together, and the verdict is for one, the other cannot be found guilty; for he cannot be guilty, since a joint act is indispensable to the crime in either, and the record affirms that there was no such joint act." Per Ruffin, C. J., in The State v. Mainor et al. 6 Ired. 340 (N. C.). Admissions expressly made "without prejudice" or under duress or in negotiations to compromise a claim, are inadmissible. But an admission

one and not against the other or others.[5] It is submitted that a rule, sound on principle, would permit judgment to be rendered against any one of the parties to an act which required the participation of all parties charged with it where the only proof of the guilt of that party is his uncorroborated admission, irrespective of whether the issue is joint or several. The question is not the guilt of all the parties to such an act, but proof of the guilt of each of them.

of an independent fact made during negotiations looking to the compromise of a claim is admissible. See the cases cited, Stephen, Digest of Evidence (Chase's 2nd ed.), page 74, notes 1 and 2.

[5] Robinson v. Robinson et al., 1 Sw. & Tr. 362 (Eng.).

CHAPTER XV.

LAW AND FACT.

190. **Introductory.**—In the conduct of every legal proceeding the questions which present themselves for decision are either (1) questions of law, or (2) questions of fact. All questions of law and some questions of fact the court must decide. Other questions of fact must be decided by the jury.

191. **Questions of law distinguished from questions of fact.**—When the court decides a question it is very often an exceedingly nice point whether that question is one of law or one of fact. The test would seem to be this: Is the court applying some rule, a knowledge of which it has gained as the result of its technical training in the law? If so, it is deciding a question of law. If, on the other hand, the court is making use of its general mental equipment without aid from its technical knowledge of the law, it is deciding a question of fact. The construction of a written agreement, for example, or indeed of an oral one, the terms of which are known, is always for the court.[6] An agreement may be susceptible of two interpretations and the court may decide to put upon it that construction least favorable to the interests of the party who drew up the agreement. In that event the court would decide a question of law because it would be applying the

[6] Spragins v. White, 108 N. C. 449.

rule of law that in a case of doubt an instrument may be construed against the maker of it. Again, it may only be necessary that the court use the rules of grammar to know what the agreement means. In that event the court would decide a question of fact because it would not be using its peculiar knowledge of the law, but knowledge of a kind it possesses in common with other men.

192. **Questions of fact—Court and jury.**—The chief questions of fact which the court must decide are all preliminary questions relating to the admissibility of evidence, questions of the construction of a writing, where no peculiar rule of law is to be applied, and the question whether or not, in actions for malicious prosecution, the prosecution was instituted without reasonable and probable cause. Other questions of fact are for the jury to decide.

193. **Verdicts of juries.**—Juries render what are called general verdicts and may render what are called special verdicts. By a general verdict the jury find absolutely in favor of one party to a cause or in favor of the other. In actions for malicious prosecution, for example, the circumstances that led to the institution of the prosecution are matters of fact and must be found by the jury. Whether or not the prosecution was instituted maliciously, i. e., from an improper motive, is also a question of fact for the jury, but by a peculiar rule, probably arising from distrust of the jury on the part of judges, whether or not the circumstances which provoked the prosecution were such as would lead a reasonable man to believe that the plaintiff was guilty of

the crime for which he was prosecuted, that is, whether prosecution was instituted on probable cause, is a question of fact reserved for the decision of the court.

The situation is met in this way: The court groups the facts which the evidence tends to prove and then charges the jury in the alternative, that if they find such and such facts exist, then that the defendant had reasonable and probable cause for bringing the prosecution and they must find for the defendant; but if they find that the facts were otherwise, then they must find for the plaintiff. Thus, the jury are left to determine what facts exist, but must be governed by the instructions of the court in deciding what group of facts amounts to reasonable cause and, after following the instructions of the court on this point, they find a general verdict, which has been compounded of law and fact, and is in favor of one party or the other.

Special verdicts. By a special verdict the jury report all the material facts they find to be proved. The court then applies the law to the facts which the jury have found. It is the privilege of the jury to find a special verdict, they cannot be compelled to do so.[7]

194. **Taking cases from the jury.**—Whether or not in any case the party who has the burden of establishing a proposition upon which the parties are at issue has presented sufficient evidence to justify a verdict by twelve reasonable men in his favor is a question for the court. Where the court

[7] Commonwealth v. Porter, 10 Metcalf 263 (Mass.).

is of opinion that twelve reasonable men could not find for the party who has the burden of proof it must withdraw the case from the jury and direct a non-suit or a verdict for the plaintiff, according as the burden of proof is upon the plaintiff or defendant.

Where the jury, according to the opinion of the court, find a verdict which twelve reasonable men could not have found upon the evidence presented the court must, upon the same principle, set the verdict aside. Where the court thus grants a non-suit (or sets the verdict of the jury aside) it applies a rule of law to the facts of the particular case. The court is guided by a rule of law, namely: Can twelve reasonable men on the facts of the case find a verdict other than one way? For the sole purpose of determining this question the court obviously must decide matters of fact adduced on the trial. That is to say, the law requires the court to resolve for itself this question: Can twelve reasonable men, *as a matter of fact,* find a verdict other than one way in this case?

Effect of taking cases from the jury. The effect of taking cases from the jury on certain set of facts is to render what was before a question of fact a matter of law. Thus, in negligence cases, where facts are simple and likely to recur frequently, courts set down rules of law prescribing that for accidents happening under the circumstances which are the subject of such rules, an action is barred by contributory negligence. Examples of judicial legislation of this kind are numerous. In New York, for example,

unless a person looks both ways and listens before crossing a railroad track he is, as a matter of law,[8] guilty of negligence contributing to any injury caused him while crossing it.

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There is an encyclopædia on Evidence, as well as a number of case books, which are of considerable value.

[8] Stackus v. Railroad Company, 79 N. Y. 464.

LAW OF ATTACHMENT AND GARNISHMENT

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PART I

ATTACHMENT

CHAPTER I.

ORIGIN AND NATURE OF THE REMEDY—GROUNDS FOR ATTACHMENT.

1. **Definition.**—In its most comprehensive sense attachment means the act or process of taking into custody the body or property of a person and holding the same to abide the order or judgment of a court. It may be used to compel the appearance of the defendant, in which case the process used is called a capias; or it may be used to seize his property and hold it for the satisfaction of a debt he owes and is sued upon, in which case the process commands the officer to levy upon the property of the defendant to a certain amount and hold it to abide the future order of the court.

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2. **Origin.**—Attachment against the person is a common law writ and was used in the English Court of Common Pleas from the earliest organization of that court. Attachment against property was unknown to the common law. It had its origin in the civil law, and by local custom came into use in London and other commercial centers of England about nine centuries ago. In the United States the proceeding rests entirely upon statutory enactment, and every state has made some provision regulating it. It is not the present purpose to consider the law of attachment with reference to the person, but this article will be confined to a consideration of the principles and provisions of the statutory law of this country regulating the taking and holding, under judicial process, the property of the debtor to the end that it may be used to satisfy any judgment which his creditor may recover against him.

3. **Subject to strict construction.**—Being in derogation of the common law the remedy is never extended by implication, and in the absence of express legislative sanction to construe liberally, the courts have quite uniformly construed the statutes strictly in favor of those against whom the proceeding is employed, both as to subject matter of the attachment and method of enforcement.[1] What is meant by that is that the plaintiff who seeks the remedy must comply with the requirements of the statute in all the steps taken by him, and if he neglects any of them the remedy will be denied.

[1] Keeley Brewing Co. v. Carr, 198 Ill. 492, 64 N. E. 1030; Faul v. Beucus, 124 Mich. 25, 82 N. W. 659; Lederer v. Rosenthal, 99 Wis. 235, 74 N. W. 971.

4. **Manner of treatment.**—Although diverse local conditions have naturally led state legislatures to enact laws of attachment dissimilar in many minor particulars, there is great similarity in the leading features of the enactments and a quite uniform trend in judicial construction.

The subject will be treated in the following order: 1. Who may use the remedy. 2. Against whom it may be used. 3. Grounds for attachment. 4. Affidavit. 5. Bond. 6. Writ and return. 7. Custody of attached property. 8. Notice to the defendant and proceedings in court. 9. Sale of attached property and disposition of proceeds.

5. **Who may use the remedy.**—It was originally allowed only to creditors who, in a civil action, sued for the recovery of money due upon a contract, express or implied. It was not allowed in tort actions. The theory was that contractual relations should exist between the parties, and that the creditor, to avail himself of the remedy, must hold a claim for money then due and payable from the debtor. At this time, in the absence of express provision, attachment will not lie on demands based upon a tort, but in some of the states the remedy is so extended by statute as to include them. In those so providing the demands are usually those which arise from the wrongful conversion of personal property or injuries thereto in consequence of negligence, fraud, or wrongful act, although in a few states it is extended to actions to recover unliquidated damages for injury to person in suits already pending and commenced by summons or capias. It may be observed, however, that in

practice resort to attachment is rare in actions for tort, and that the great majority of the cases in which it is used are ex contractu and where the demand is for a fixed sum.

6. **Same subject.**—The right is not limited to a party original to the contract. It may be exercised by an assignee, an administrator, a conservator, or any person who, in a representative capacity, has the right to sue in law upon the demand. Copartners, tenants in common, joint tenants and corporations may resort to it. Although the right by some early statutes was limited to residents of the state, it is now quite generally provided that it may be exercised by persons not being within the state, and even by persons not citizens of the United States, provided they be of a class entitled to sue in the courts of this country.

7. **Against whom the remedy may be used.**—From what has been said it is apparent that the remedy, as a general rule, can only be enforced against the property of a person who stands in the relation of debtor to the plaintiff in the action. Whether the indebtedness must be one that is due at the time of suing out the writ, or one that may thereafter become due, depends wholly upon the local statute. When the action for the recovery of the debt is against partners the proceeding may be against partnership property. Where the action is against several, who are jointly and severally liable for the debts as partners or otherwise, an existing ground of attachment against one will not support an attachment of the property of any of the others against

whom there are no grounds of attachment alleged. As a general rule, the property of an unmarried woman is amenable to attachment, as is the property of a married woman in those states where, by statute, they may enter into contracts independent of their husbands. Private corporations are liable in attachment upon the same causes of action and upon the same grounds that prevail against individuals. It should be noted, however, that the courts are not entirely harmonious in cases against foreign corporations doing an interstate business, where the ground alleged is non-residence.

8. **Same subject.**—In the absence of express statutory authority, property held by administrators, executors, or guardians, may not be reached by creditors on attachment. Such remedy is obviously inconsistent with the administration of the assets of an estate or the management of a ward's property. Trustees, receivers, and others holding property by virtue of court appointment are ordinarily not subject to the remedy. The property of a municipal corporation, such as a county, city or village, is not liable to attachment, for the same reason that precludes the sale of its property on execution. Judgments against it are usually satisfied through assessment and collection of taxes ordered and made by the officers of the corporation.

9. **Grounds for attachment—Classification.**—Ordinarily a debtor is allowed to possess and enjoy his property without interference on behalf of his creditor until it has been judicially determined what and how much his indebtedness is. Judgment, formally

rendered by a court of competent jurisdiction after the debtor has had an opportunity to be heard, and an execution, formally issued from the judgment, must precede the taking of his property to satisfy the indebtedness. Inasmuch as attachment allows the taking of the debtor's property before a judicial determination of the nature and amount of the indebtedness, it has been aptly called an extraordinary proceeding. The different states have undertaken to declare the conditions under which that extraordinary proceeding may be availed of. They are termed the grounds of attachment, and are based upon the inadequacy of ordinary process. They may be divided into three general classes: A. Where the debtor has placed himself in such a position that he cannot be reached by personal summons. B. Where he has made, or is about to make, such disposition of his property that it cannot be reached by ordinary execution. C. Where the debt which is the subject matter of the litigation was fraudulently contracted by the debtor.

10. **Non-resident debtors.**—There is general uniformity now in the states of the Union authorizing attachment against the property of non-resident debtors. The principle is thereby recognized that property is subject to the jurisdiction of the state though its owner may reside out of it, and this does not involve any turpitude on the part of the debtor beyond that incident to his refusal or neglect to pay his debts. The statutes are not uniform in phraseology, however. In some of the states the words employed are, "When the defendant is a non-

resident of this state;" in others, "When the defendant is not an inhabitant of this state;" "When the defendant resides out of the state," and the like.

It is not necessary that the debtor have residence or place of abode in some other state or country. He may be a constant traveler having no fixed place of abode. The prominent idea underlying this authorization is that the defendant, because of his non-residence, is beyond the reach of the state's ordinary process. As to whether the non-residence must be permanent as distinguished from temporary, is a question on which courts are not harmonious. In a few states the courts incline to the view that temporary absence because of business or pleasure does not render a debtor amenable to the statute, but the sounder rule, it would seem, is that his property is attachable if his absence is protracted beyond reasonable limits and his residence is not such as to subject him personally to the jurisdiction of the court and place him on an equality with other residents in that respect.

11. **Absconding debtors.**—Quite uniformly, also, the states provide for attaching the property of absconding debtors. A party absconds in a legal sense when he hides, conceals or absents himself clandestinely with intent to avoid the service of legal process. In his case the question of residence, his presence in or absence from the state, is immaterial. He may be an absconding debtor without departing from the limits of the state. If he remains in hiding or shuts himself up from his creditors he is an absconding debtor, the gist of the charge being that by his

own act he has rendered, or will render, ordinary process ineffectual. But the mere fact that he does not live within the county where he does business, or where the debt is payable, does not amount to "concealing" himself. The plaintiff sued out an attachment from an Illinois county alleging in the affidavit "that the defendant conceals himself and evades the officer so that ordinary process of the law cannot be had or served upon him." The evidence showed that the defendant, having a residence in Wayne County, carried on a mercantile business through others in Clay County, where the writ was sued out. He rarely went to Clay County, but frequently went to St. Louis on legitimate business connected with the store, and with no purpose of evading service of process. It was held that there was no cause for attachment.[2] In some of the states a debtor who stands in defiance of an officer so that process cannot be served upon him, is treated as an absconding debtor, and in a few it is sufficient to show that the debtor is about to abscond.

12. **Fraudulent disposition of property.**—Having considered the grounds of attachment because of the debtor's placing himself beyond the reach of personal summons, the next grounds to be considered are those which may exist by reason of the fraudulent disposition of his property or the intended disposition of it. The conveyance of a debtor's real estate made with the fraudulent purpose of hindering and delaying his creditors, and the transfer, concealment or disposition of his personal property

[2] Boggs v. Bindskoff, 23 Ill. 66.

made with a like fraudulent purpose, are causes for attachment in all of the states. The courts generally hold that the transfer must have been made after the creation of the indebtedness unless, when made, the debtor intended to contract the particular debt and defraud the creditors. As a general rule, mere constructive fraud is not sufficient; and by the term constructive fraud is meant an act which the law pronounces fraudulent because of its tendency to deceive or mislead and not because of any evil design on the part of the doer. The debtor must have been actuated by a fraudulent purpose to justify attachment, proof of which must be presented on the trial.

13. **Debtor contemplating fraudulent disposition of his property.**—The writ is allowed whether the debtor has made the fraudulent disposition of his effects or is about to do so. The authorizations vary in the different jurisdictions, but that the debtor is about fraudulently to conceal, assign or otherwise dispose of his effects, so as to hinder or delay his creditors, is sufficient ground in almost every state. The fraudulent purpose may be shown by his declarations or its intent may be inferred from his acts and conduct. Preparation for the conveyance of real estate or the transfer of personal property as a gratuity or for a grossly inadequate consideration are always admitted as proof of the charge. But the acts from which the inference of intent to defraud creditors is sought to be drawn, must be of recent occurrence. Evidence that the debtor a few years before was embarrassed and put his property out of his hands to delay creditors is not admissible, al-

though he be now laboring under like embarrassment.[8]

14. **Intended removal of property from the state.**—It is sufficient ground for attachment that the debtor is about to depart from the state with the intention of having his goods removed from it, or that he, without the intention of departing himself, is about to have his effects removed from the state to the injury of his creditors; and in either case the writ is accorded regardless of any fraudulent purpose of the debtor. His good faith is not involved, but it has been held that where the purpose of removing the property is to raise money to pay debts it subjects the debtor to liability to have his property attached. The rights of the creditor are jeopardized when the debtor removes his property from the state without leaving enough to pay all of his creditors. The creditor cannot rely upon ordinary process in such a case, and that is the reason which lies at the foundation of the provision for attachment.

15. **Fraud in contracting the debt.**—Most of the states allow attachment not merely because the debtor has put himself without the reach of personal service, or because he has made or is about to make fraudulent disposition of his property, but also because of his fraud in contracting the debt. The debtor may be living permanently and openly within the state, with no thought of absconding or transferring his property or of removing it from the state,

[8] Clark v. Smith, 7 B. Monroe 273 (Ky.); Askwith v. Allen, 33 Nebr. 418, 50 N. W. 267; Boyd v. Labranche, 35 La. Ann. 285; Lewis v. Kennedy, 3 Greene 57 (Iowa); Hardee Co. v. Langford, 6 Fla. 13.

yet if the debt upon which suit is brought was fraudulently contracted his property is subject to attachment. What constitutes sufficient fraud in such a case has been of no little embarrassment to the courts, and to obviate such embarrassment it has been provided in a few jurisdictions that the statements constituting the fraud must have been reduced to writing with the signature of the debtor, or of someone acting for him, attached.

This provision is based upon a theory entirely distinct from the others considered. Its purpose is to reach that class of cases in which a creditor has been deliberately injured by the willful falsehood of the debtor. One who, knowing that he is insolvent, makes a statement that he is solvent, and does so for the purpose of obtaining credit, fraudulently contracts a debt within the meaning of the statute. The presumption is that the debt was incurred with intent to defraud. Even if the debtor was solvent at the time, but made a false statement as to his financial condition, either as to property owned, or debts owed, and did so with intent to deceive and get credit, he comes within the provision. On the other hand, if a debtor, supposing himself to be solvent, in good faith makes statements to the effect that he is, when he really is not, his untrue statement would not in itself make him liable in attachment. The false statement need not be made directly to the creditor. If made to a commercial agency, for the purpose of obtaining a false rating, upon the faith of which rating a merchant is induced to sell on credit to the party making the statement, it comes within the stat-

ute. Likewise, does a false return as to solvency made by an officer of a corporation to the Secretary of State, from which a commercial agency has made a rating that is relied upon by one from whom the corporation seeks credit.[4] In a few of the states the grounds of attachment extend beyond those mentioned, but they are exceptional and for that reason need not be considered.

[4] Emerson v. Detroit Steel & Spring Co., 100 Mich. 127, 58 N. W. 659; Gries v. Blackman, 30 Mo. App. 2.

CHAPTER II.

AFFIDAVIT—BOND—WRIT—CUSTODY OF ATTACHED PROPERTY.

16. **The affidavit.**—The proceeding may be initial, in which case it is termed "original attachment"; or it may be commenced in a suit already pending, at any time before final judgment, in which case it is termed "attachment in aid." In all the states except Connecticut, Maine, Massachusetts, New Hampshire and Vermont, an affidavit must precede the issuing of the writ. It must be made by the plaintiff, his agent or attorney, and should set out the nature and amount of the indebtedness, with the grounds for attachment then existing. If the writ is applied for by a corporation the affidavit may be made by an officer of the corporation whose duty it is to learn of the facts alleged. As a general rule, it may be sworn to before any officer authorized to administer oaths; but it should be filed with the clerk of the court from which the writ is sought, and be made part of the record. It is the preliminary step to the lien and it is important that it be so marked by the clerk that it may be identified with the proceedings to follow. Mere neglect of the clerk to mark the affidavit "filed" will not invalidate the proceedings, however.

17. **Affidavit jurisdictional.**—The affidavit is necessary for jurisdiction, and if it does not follow the requirements of the statute the writ will be quashed

and the entire attachment proceedings dismissed.[5] It is the foundation on which the proceedings rest, on which the court takes jurisdiction, and if the plaintiff neglect to lay it, every step afterwards taken, whether by court, clerk or sheriff, is void. Not only would a judgment or order for sale of the property be subject to reversal upon writ of error, but without a reversal, or any attempt to have the proceedings reviewed, a sale by the sheriff would give the purchaser no title. What is here said about the court's orders being void for want of jurisdiction is intended to apply to a case where there is no personal service or appearance on the part of the defendant, of course. By the service of summons or personal appearance the court obtains jurisdiction of the defendant and can proceed to judgment; and in such case the defendant might, by pleading to the attachment or by offering evidence against the ground urged by the plaintiff, debar himself, as well as his grantee, from afterwards urging that a sale of the attached property was void because no affidavit was filed.

18. **Contents of the affidavit.**—There are two distinct parts of the affidavit, one relating to the amount due from the defendant to the plaintiff, and the other as to the facts relied upon as ground for obtaining the writ. There are two principal reasons for requiring the amount of the indebtedness to be stated:

[5] Mobile Life Ins. Co. v. Teague, 78 Ala. 147; Thompson v. Robinson, 34 Ark. 44; Skinner v. Beshoar, 2 Colo. 383; Eads v. Pitkin, 3 Greene 77 (Iowa); Estlow v. Hanna, 75 Mich. 219, 42 N. W. 812; Powers v. Hurst, 3 Blackf. 229 (Ind.); Halley v. Jackson, 48 Md. 254; Wallis v. Wallace, 6 How. 254 (Miss.); Wando Phosphate Co. v. Rosenberg, 31 S. C. 301, 9 S. E. 969; Maples v. Tunis, 11 Humphr. 108 (Tenn.); Hudkins v. Haskins, 22 W. Va. 645.

one is, that it may determine the size of the bond which the plaintiff must execute prior to the issuance of the writ, and the other is, that it may show whether the amount of indebtedness is equal to or above the minimum sum for which attachment is authorized under the statute. The averment as to indebtedness must be stated positively and not by way of inference; and, although the rule is different in a few of the states, it is quite generally held that a statement made upon information and belief is not sufficient.

19. **Same subject.**—In alleging the grounds of attachment, especially should the affidavit set forth the ultimate facts with certainty and particularity, for the court will not allow the attachment to stand if the evidence does not support the ground charged in the affidavit, even though it shows another existing ground. For instance, in a state authorizing, as distinct grounds of attachment, a fraudulent disposition of property by the debtor within two years, and an intended disposition of his property for the purpose of hindering and defrauding creditors, the plaintiff's judgment was set aside, where the sole ground set up in the affidavit was that "the defendant had within two years fraudulently assigned and transferred his effects with the purpose of hindering and delaying his creditors," the evidence being that the defendant was about to make such fraudulent transfer and was only prevented by the attaching officer taking charge of the property. While statement of one statutory ground is sufficient to procure the issuance of the writ, the affiant may state as many coexisting grounds as he likes. If any

one of them be shown to be true it will sustain the writ. If the debt is a joint one against two or more debtors and one ground of attachment exists against one and another and different ground exists against the other or others, the affiant may set up in one affidavit the grounds against each debtor as it exists. Defective affidavits may be cured by amendment, and others may be amended by including grounds not originally set up; but as affidavits, bonds, writs, returns, etc., are usually made only upon order of the court the question of amending them will be deferred until it is considered herein under the head of Proceedings in Court.

20. **Bond.**—The remedy of attachment being extraordinary and often drastic in its nature, it would seem unjust to the debtor were he not protected lest it be wrongfully used against him. Therefore, in most of the states, it is required that the plaintiff before obtaining an attachment shall execute a bond, with security, for the indemnification of the defendant against damage by reason of the wrongful suing out of the writ. The terms of such instruments vary, but that is the usual scope of them. Great strictness has been manifested on this point, and a failure to give bond is fatal to the suit, unless the statute authorizes the defect to be cured. The sufficiency of the bond may be questioned, either as to its terms, parties, or amount, and if not such as the statute requires it will be treated as no bond at all, subject, of course, to any authorized amendment. In some states the statute not only prescribes the conditions and regulates the penalty, but gives the form of the bond. Where that is

the case the form must be followed. Whether there be a prescribed form or not the conditions generally are that the plaintiff must prosecute his action without delay and pay any judgment that may be awarded against him for costs and damages for wrongfully suing out the attachment. The duty of accepting and approving the bond usually rests with the clerk or officer issuing the writ, and unless the statute requires him to endorse his approval the act of accepting it and issuing the writ will be treated as an approval.

21. **The obligee.**—While the usual requirement of the statute is that the defendant in the suit be made the obligee in the bond it should be understood that it means the defendant against whom the attachment writ is to issue. If A should bring suit against B and C on some joint obligation, and, there being a cause for attachment against B that did not exist against C, A should desire to attach the property of B, then B alone should be made the obligee. Should A fail in his suit and an action afterwards be brought to recover for a broken condition it would be brought in the name of B. Some statutes require the bond to run to the state. Where that is the case and it is desired to bring suit upon it to recover damages for a broken condition, the action would be in the name of the state for the use of the party whose property had been wrongfully attached. Likewise where an attachment is sued out against all of several defendants and the property of only one is attached, a suit upon the bond, although brought in the name of all the obligees, would

be for the use of the defendant having his property attached.

22. **Execution of the bond.**—The plaintiff is usually required to sign the bond, but that often might be impracticable. His agent or attorney might learn of an intended removal of the debtor's property from the state at a time when ready communication with the creditor is impossible. In such cases it is generally provided that the agent or attorney may execute the bond for the creditor. This may be done without power of attorney, but in such case, the agent so signing becomes the principal obligor. Where the agent has power of attorney to sign and does sign as attorney of fact for the creditor, then the creditor becomes the principal obligor. But if an attorney-at-law has not the specific power to sign the creditor's name, although he may have general authority to collect for the creditor and transact business for him, a bond so signed would not be binding upon the creditor in the absence of ratification. The court might accept the bond on the presumption that the attorney had the authority to sign his client's name, but in the case of suit on the bond the client could successfully defend upon the ground that the attorney did not have the authority. However, that would not render the bond void. It would be a subsisting obligation of the attorney and the sureties.

23. **Surety.**—The surety must sign with the principal and that act obligates him to pay if the principal does not. He must be a resident of the state and in solvent circumstances. If he be a member of a partnership firm he cannot bind the firm un-

less specifically authorized to do so; but his act in signing the firm name without such authority will bind him personally. Solvency, residence in the state and ability to contract, etc., are presumed, but the presumption may be overcome by the defendant showing the contrary. If during the pendency of the suit it is made to appear that the bond is insufficient because the surety at the time of signing was not solvent, or because he has become insolvent since signing, the plaintiff may be required to furnish another and a solvent surety. Clearly the defendant has the right to have a good bond for his indemnity at all times during the pendency of the proceedings. In such case the added surety would become liable for a breach of condition to the extent of an original surety.

24. **Nature of the writ.**—The preliminary affidavit and bond having been executed, the next step is the issuing of the writ which authorizes the officer to whom it is directed to levy upon and hold so much of the debtor's property as will be sufficient to satisfy the creditor's claim.

Where the proceeding is initial and not in aid, the writ performs the dual function of a personal summons and an execution. It performs the function of a summons in that it commands the appearance of the defendant to answer the plaintiff's complaint, and of an execution in so far as it authorizes the seizing of the defendant's property. Ordinarily no judicial deliberation is called into operation, and the act of issuing the writ is performed by the clerk of the court upon the plaintiff's complying with the provi-

sions of the statute as to affidavit and bond. The act is, therefore, a ministerial, rather than a judicial one. As the clerk is but the agent of the court or judge he is supposed to act under the authority of the court and the supervision of the judge, however. Although in its strict sense not a judicial act, the issuing of the writ is a step in the direction of exercising the powers of the court and for that reason should be subject to regulation by the court within such limitation as is fixed by statute.

25. **Duty of the officer receiving.**—It is the duty of the officer on a writ coming to his hands to execute it at once, and if delay on his part in that regard results in loss to the plaintiff he is answerable for such loss. If it be in legal form and issued out of a court of competent jurisdiction it will be a complete justification to the officer for attaching, and no obligation rests upon him to investigate whether the preliminary steps have been pursued. The plaintiff's claim may not be a just one; though just it may not be collectible through process of attachment; though just and collectible through attachment the ground for seizure charged in the affidavit may not be sustained by the facts; yet will the writ, if issued in conformity with the statute, be a complete shield to the officer so long as he does his duty under its mandate. Under it he is authorized to levy upon the defendant's personal property and real property. While he is authorized to levy upon property sufficient in amount to satisfy the claim set up in the affidavit and pay costs, he may not seize upon and withhold from the possession of the defendant property

grossly in excess of what is necessary for that purpose, unless, of course, the property is of an indivisible nature.

26. **Same subject.**—To guard against excessive levies it is provided in some states that the officer shall have the property appraised by disinterested freeholders and such appraisement returned into court with the writ. If the levy is made upon real estate the officer is not required to take possession, but for the purpose of preserving evidence of the levy and of affording notice to purchasers and others that the land is incumbered, he is required to file with the recorder of deeds a certificate of his levy. In all cases where the officer is required by statute to have personal property valued by appraisement or to have recorded a certificate of his levy upon real estate he should closely follow the statute. Otherwise, the lien of the attachment might be lost and he become liable to the creditor.

27. **Return of writ.**—After being executed the writ is returned to the court from whence it issued, with an indorsement thereon, setting forth the manner of its execution. It is open to attack (usually by motion to quash) for any substantial defect appearing in the affidavit, the bond or the writ itself. The quashing of the writ effectuates the release of the property, of course, and destroys all lien or privilege which might inure to the plaintiff by virtue of the levy. It should be observed, however, that the liberal statute of amendments and jeofails, in force generally in the states, permits amendments to affidavits, bonds and writs in all matters of form and in most

of the states amendments as to substance, and in that way a release of the property may be avoided. If the return of the officer shows that the writ has been improperly served, the service may be quashed also.

28. **Attaching officer's possession.**—Where the subject of the attachment is real estate the question of custody does not arise, for the reason that the possession of the debtor or anyone claiming under him is not disturbed. But in the attachment of chattels, the purpose of the writ being to hold the property of the defendant until, under final process in the cause, it can be made available to satisfy the plaintiff's demand, it is highly important that the officer should sustain such relation to the property he has seized as will enable him to produce it when final process shall be awarded. His care of it is important, too, in view of the fact that he must return it to the defendant unimpaired in the event of the cause being decided adversely to the plaintiff. To that end he is, by the levy of the writ upon personal property and its reduction into his possession, vested with a special property in it, which enables him to protect his possession. In order to maintain it, however, and to entitle him to the continued protection of the law, he must comply with the requirements of the statute, or show legal excuse for not doing so; and if he does not, he becomes liable, not only to the attaching creditor, but to the owner of the property and those claiming under him.

29. **Pursuit of removed property.**—If the attached property be removed, without his consent, the officer may pursue and reclaim it, even though it be

removed to another county, and all instruments of the law available to his reclaiming it he may command. In fact it is his duty so to pursue it and his failure therein will make him liable for all resultant loss. For instance, where in an action against an officer for such a failure, the property consisted of a quantity of sawlogs, he offered to prove that the logs were afloat in a boom on their way down the stream, and that the current of the water was so great that he could not with any force at his command stop the logs and prevent them going into another county and into the possession of other parties, it was held that the evidence was properly rejected, the facts, if true, constituting no defense.[6]

30. **Preservation against loss.**—Not only must the officer keep the property in his possession and control but he should take reasonable precaution against loss by fire, flood, theft or otherwise. It is his imperative duty so to preserve it that it may be subject to the final order of the court in as unimpaired condition as possible. That duty continues with him, even after the expiration of his official term, unless the statutes of his state provide some means by which he may transfer his special right in the property and shift his responsibility to his successor.

If the property consists of horses, cattle or other livestock he must make provision for its sustenance; or if it be property requiring extraordinary care for its safety he must exercise such care.

31. **Sale of perishable property.**—If the attached property be of a perishable nature and in immediate

[6] Lovejoy v. Hutchins, 23 Maine 272.

danger of waste or decay many of the statutes provide for its sale, like sale on execution, and the proceeds held to abide the final judgment in the suit. The methods of determining whether the property is of a perishable nature and of conducting the sale vary in the different states, but the courts are quite strict in requiring the officer to follow the steps marked out by the statutes.

In a few of the states, sale of the property not actually perishable but of such character that the keeping of it will necessarily be attended with such expense as greatly to depreciate the amount of the proceeds to be realized therefor, may be had after appraisement as in the case of perishable property. The object of sale is to change the form of the property for the benefit of both creditor and debtor. Either may ask for the sale, and neither can prevent it, if the conditions are such as to bring the property within the provisions of the statute. The title which the purchaser gets at such a sale is good as against the world. Even if it should turn out afterwards that the property did not belong to the defendant or that there was a valid and subsisting lien upon it, the purchaser's title would stand. The claim of the true owner or lienor would follow the proceeds, however, and be satisfied from them.[7]

32. **Forthcoming bond.**—In some of the states the defendant or person in whose possession the property may be found is allowed to retain possession of it on entering into a bond with security, with condi-

[7] Young v. Kellar, 94 Mo. 581, 7 S. W. 293; Betterton v. Eppstein, 78 Tex. 443, 14 S. W. 861.

tion that the property will be forthcoming to abide the judgment of the court in the suit. The effect of giving such a bond, usually termed a "forthcoming bond," is not to discharge the lien of the attachment. Its object is simply to secure the safe keeping and return of the property if its return should be required, and for that reason it is not subject to a subsequent attachment, or a junior execution. If an officer in A's suit by attachment against B should seize property and B should desire to retain the present possession he would be permitted to do so by entering into a bond to the officer, with condition that the property shall be forthcoming to answer the judgment of the court in the pending suit. The bond would be discharged by a return of the property or by failure of the plaintiff to establish his ground of attachment.

33. **Dissolution bond.**—There is another kind of bond available to the defendant, called "bail bond" or "dissolution bond." It has the effect to dissolve the attachment and entirely release the property. It may be given at any time before final judgment by a defendant desiring a return of the attached property. Its condition is that the defendant or his sureties will pay whatever judgment may be recovered against him in the suit. Such a bond obliges the payment of the judgment by the defendant or his sureties though the attachment was wrongfully issued. In other words, on the execution and approval of the dissolution bond the suit will be conducted as an ordinary action against the defendant personally and judgment necessarily rendered without recognition

of the lien and without reference to the attached property, although the defendant may, for the purpose of relieving himself from payment of costs attending the attachment, deny the allegations of the affidavit on which the attachment issued. If the defendant is successful in the trial of the issue raised by his denial of the affidavit, judgment would go against the plaintiff for all court costs incident to the attachment and such expense as was necessarily incurred by the officer in caring for the attached property.

CHAPTER III.

NOTICE TO THE DEFENDANT AND PROCEEDINGS IN COURT—SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

34. **Personal service.**—Where there is personal service upon the defendant the suit will be in personam (against the person) as well as in rem (against the thing); if judgment be rendered in favor of plaintiff it will be a general one against defendant, and, if plaintiff succeed in his attachment, special against the property levied upon. In such case the court has jurisdiction over the person as well as the property. And it may be noted here that it is not always necessary to the court taking jurisdiction of the defendant that the writ be read to him or that a copy of it be delivered to him in person. Most of the states make the delivery of a copy of the summons at the domicile of the defendant with an inmate of competent age to receive it, as good in law as an actual service of it upon the defendant. A party served that way can disregard it only at his peril. In those states, at least, the leaving of a copy of the attachment writ at his usual place of abode with a member of the family of competent age will constitute personal service.

35. **Service by publication.**—But where personal service is not had upon the defendant, as where he is a non-resident, an absconding debtor, or one who

stands in defiance of an officer so that personal service cannot be had upon him, then the proceeding is in rem. In such cases there is provision in all the states for another kind of notice than by summons, called "service by publication." Service by publication is effected ordinarily by publishing in a local newspaper of general circulation and by posting notices in conspicuous places in the locality where the proceedings in attachment are pending. Such service was unknown to the common law, and has never been regarded as sufficient to justify the court in rendering judgment or order requiring the defendant to do anything. While spoken of frequently as "constructive service," that use of the term has been justly criticized. It is really nothing more than information, given in a public way to a defendant who is beyond territorial jurisdiction, or secreted within it so as not to be personally found, of notice of the pendency of a suit against him. Not only must the notice be published as often as is required, but to comply with the spirit of the law, those who have the direction of the publication should select the most widely read newspaper or the one most likely to reach the defendant. Some of the statutes wisely provide that the officer charged with the duty of making the publication shall mail a copy to the defendant at his last known address.

36. **Preserving proof of service by publication.**—The various steps required by the statute to accomplish service by publication must be strictly followed and evidence of them preserved in the record. Such evidence must be precisely what the statute pre-

scribes where there is a provision specifying what form the evidence must have. Notice to the absent defendant, like notice in any other prescribed form, and like any other jurisdictional matter, must appear of record. Failure of the record to show the fact of publication of notice in compliance with the law is so serious that judgment in favor of an attaching creditor may be reversed on error. Although differing from summons in not authorizing the court to render a personal judgment, publication notice does not differ from it so far as concerns the preservation of evidence. Every reason against omitting the summons from the record, where the defendant makes no appearance so as to cure defect in the summons, applies against the omission of publication notice when it is relied upon to show jurisdiction completed over the attached property. If pending the proceeding it be discovered that proofs of notice by publication are defective, proof of correct service may be supplied. Courts are quite liberal in allowing reports of notice proofs to be corrected so as to conform to the facts. The court should approve the service. If the service is so substantially defective that judgment rendered under it would be void, the attachment does not necessarily abate, but upon motion of the plaintiff the cause will be continued to some subsequent term or time to enable proper service to be made, and in the meantime the attached property will continue in the possession of the officer who made the levy.

37. **Effect of service by publication.**—Publication notice does not give the court jurisdiction. The

actual attachment of property must concur to effectuate that. Not only is this so, but there must also be continuous holding of the attached property. It follows, therefore, that if the sheriff should release the levy, or the property be destroyed by fire or otherwise, in the absence of appearance by the defendant, the court loses all authority to adjudicate the claim, no matter how perfect the record relating to publication. As to the effect of this kind of service, the courts have not been entirely harmonious. The want of harmony arises not so much from difference in statutes under which the cases have been decided as from efforts to reconcile the arbitrary provisions of this method of obtaining service. Keeping prominently in view the sacredness of personal rights, some of the courts hold that publication of notice is intended to obtain jurisdiction of the person, although they concede that no jurisdiction of the person is thereby obtained for any other purpose than to make the attached property subject to sale in payment of the debt sued on. They accordingly hold that where there has been no publication, or publication which is fatally defective, the proceedings are void. On the other hand, a few of the courts take the view that the essentials of jurisdiction are acquired by seizure of the property under the writ and that the omission of publication is a mere irregularity. The better view, however, is that the publication is a substitute for summons, and however inadequate it may be in the direction of giving notice to the defendant, it is nevertheless a right that should not be ignored—that a judgment rendered without it is void, and that no

title to property sold thereunder is acquired by the purchaser.[8]

38. **The pleadings.**—In states where the rules of common law pleading obtain, the plaintiff must present to the court his cause of action by declaration, and in those states which have abolished common law pleading, the plaintiff must present his cause of action by petition, complaint, or by such other instrument as the code provides for the plaintiff in an ordinary action. A failure to do so in the manner and within the time prescribed by statute or rules of court may result in an abatement of the suit and a release of the attached property. In other words, in addition to affidavit, bond, writ, levy of the writ, and service of summons or notice by publication, there must be some pleading in which the plaintiff's cause of action is set out. Of course, this is meant to apply only to courts of record where written pleadings are required and not to courts conducted by justices of the peace and other inferior courts where written pleadings are not required.

39. **The defendant not appearing.**—If the defendant does not appear and enter some character of defense, the court will hear evidence as to the claim of indebtedness and the ground of attachment set up in the affidavit, and render judgment accordingly. If the defendant has been personally served with process and the court finds from the evidence a just claim of indebtedness and that the ground of attach-

[8] Millar v. Babcock, 29 Mich. 526; McMinn v. Whelan, 27 Calif. 300; Clark v. Bryan, 16 Md. 171; Haywood v. Collins, 60 Ill. 328; Firebaugh v. Hall, 63 Ill. 81.

ment set up in the affidavit exists, the judgment will be a general one against the defendant and a special one against the property attached.

If there has not been personal service, and the only notice has been by publication, the judgment will be special only against the property. In such a case there must be proof both of indebtedness and of the ground of attachment alleged. Lack of proof in either one will be fatal to judgment, no matter how abundant it may be in the other. To illustrate, a creditor having fulfilled against an alleged non-resident debtor all the statutory requirements as to affidavit, bond, writ, and service by publication, and with such levy upon the property as to give the court jurisdiction, may prove a cause of action, certain in character and amount, yet will he fail to recover judgment if his proofs as to the debtor's residence be by the court deemed insufficient.

40. **Defendant appearing and defending.**—If the defendant appears he may institute two lines of defense, one as to the attachment and not as to the indebtedness; or he may defend as to the indebtedness alone. If he succeeds in his defense as to the indebtedness, judgment will go against the plaintiff as to the entire proceeding, the property levied upon will be released from attachment, and plaintiff and his sureties on the attachment bond will become liable to the defendant for all damages sustained by him for the wrongful suing out of the attachment. That would be the result whether he plead to the attachment or not. The issue evolved as to the cause of action is entirely distinct from the issue raised in the

attachment. The pleadings to produce it are conducted as if no attachment had been sued out.

41. **Same subject.**—The issue on the attachment is raised by pleading to the affidavit. The plea or answer is by way of traverse to the facts set up in the affidavit constituting the ground for attachment, and is required to be on oath. It is usually spoken of as a plea in abatement, and in most states is heard before a trial of the issue involved in the claim of indebtedness. It is not a plea in abatement as understood at common law, however. At common law the filing of a plea in bar before a plea in abatement was disposed of was a waiver of the plea in abatement. In some of the states the two issues may be pending at the same time and may be tried at the same time; and it would seem to be more convenient and more expeditious, where the defendant has pleaded to the affidavit and to the declaration also, to have the two issues tried at one and the same time. In such case there are two distinct findings, one as to the indebtedness and the other as to the alleged cause for attachment.

42. **Third party interpleading.**—It sometimes occurs that a person not a defendant claims the property attached. In most of the states, such a person, instead of being compelled to resort to replevin to assert his claim, may interplead in the attachment proceedings, verifying his plea by affidavit, without giving bond. The property is not thereby released from the levy, but continues in the custody of the officer. On the filing of the interplea it becomes the duty of the court through trial by jury, or such other

mode as the statute may prescribe, to determine the right of the claimant to the property. If found to be in the claimant, it will be released and judgment rendered in his favor for the property and all costs necessarily expended by him. If the claimant recovers all the attached property it has the effect to end the attachment proceedings, but suit may continue for the purpose of determining the question of indebtedness between the plaintiff and the defendant, provided the defendant has been served with summons or appears. In the absence of such service or appearance, however, the effect would be to end the entire cause. For example, in A's suit against B, a nonresident debtor, the only service is by publication. The property levied upon as the property of B is claimed by C, who by interplea establishes his right and obtains possession of it on the order of the court. B not appearing, personal judgment cannot be rendered against him, and as all the property seized upon the attachment has been released, the court is without jurisdiction to proceed.

43. **The amendments.**—The general trend toward liberal amendment in court proceedings, which has been so manifest in late years, has extended to proceedings in attachment. It has included amendments of substance, as well as of form, and, in many of the states, it is provided that no writ of attachment shall be quashed, nor the property taken thereon restored, on account of the insufficiency of the affidavit, writ of attachment, or attachment bond, if the plaintiff shall cause a legal and sufficient affidavit or bond to be filed, or the writ amended in such manner as the court

shall direct. In other states where less liberality obtains, amendments are allowed only to cure defects of form. Mere clerical mistakes, such as a failure to insert the day of the month or the omission of a word easily supplied in making sense of the context, are readily corrected on leave, independent of any express authorization appearing in the attachment act; but defects of substance are incurable except where the right to amend has been expressly extended by statute to matters of substance or where it is held, as in some states, that the statutory provision allowing amendments generally in matters of procedure applies.

44. **Amendment of affidavit.**—Defects in the affidavit are of two kinds: those which affect the jurisdiction and those which do not. Where the statute requires the plaintiff, in addition to stating the nature and amount of indebtedness, to set forth some one of the statutory grounds for attachment and the affidavit does not do so, the defect is jurisdictional, and in the absence of personal service upon the defendant, the court has no authority to render any character of judgment. An affidavit setting up none of the statutory grounds for an attachment is a nullity, and the court, not having acquired jurisdiction, cannot make an order to amend. Where the affidavit does set forth a statutory cause, however, the court may allow an amendment to the extent of changing to another cause or of correcting a defective statement of the one set up. Rights acquired by third parties after the issuance of a writ upon a defective affidavit are unaffected by the amendment, however.

45. **Amendment of bond.**—A bond may be insufficient because of a defect appearing upon its face or because the sureties are insolvent. Objection is usually raised to it on a motion of the defendant to quash the writ. The purpose of the law requiring the bond is to indemnify the defendant against a wrongful use of the writ, and if it be insufficient to fulfill that purpose, the writ should be abated. But if the plaintiff has in good faith undertaken to comply with the statute, it would be unjust to deny him an opportunity so to correct the bond as to make it a sufficient indemnity. Accordingly, when a motion to quash the writ is based upon a defective bond, the court will allow a cross motion to amend the bond or supply a new one, and if the correction shall be made in such time and manner as the court may direct the motion to quash will be overruled. If the bond be amended the amendment must be with the consent of the sureties, of course.

46. **Amendment of writ.**—As in the case of a defective affidavit, amendments of the writ are more freely allowed before levy than afterwards. There is no reason why the court may not before service allow any kind of an amendment. Nobody is in court but the plaintiff, no property has been attached, and the rights of no one can be prejudiced by it. But after levy the defendant has an interest to oppose the bettering of a bad writ, and the court should not allow any substantial amendment without giving him an opportunity to be heard. Even if he appears and consents, the amendment will not retroactively make the writ good as against other attachments of the

same property.[9] Such formal defects as the omission of the seal of the court, the filling-in of the wrong date, and the like, are amendable at any time while the proceedings are pending.

What has been said in relation to amending the writ applies to applications for amending the return of the officer who served it. The return is a report which apprises the court and the parties litigant of what the officer has done in the way of executing the command of the writ, and if it does not recite the truth it should be amended in such a way that it does.

47. **Amendments generally.**—Other amendments than those involving the affidavit, the bond, or the writ, such as applications to amend certificates of publication, reports of appraisement of perishable property, or orders spread of record by the clerk, are always proper matters for judicial consideration, and it is a universal rule in attachment, as well as in other proceedings, that the court will lend a ready hand toward having its records recite the truth. It should be observed, however, that there is a great difference in the length to which a court will go in matter of amendment in a case where proceedings are pending and undetermined and in a case that has been concluded. So long as the case is on the docket as an undetermined controversy, the court has complete control of its proceedings and may correct defects and mistakes without impairing the rights of anyone. But when the controversy is closed by final judgment and the cause is off the docket, the court

[9] Putnam v. Hall, 3 Pick. 445 (Mass.).

will hesitate to make any change or correction even upon notice, and will not do so if it tends to impair the rights of innocent purchasers or other creditors.

48. **Grounds for dissolution of attachment.**—As already suggested, a finding in favor of the defendant on the question of indebtedness works a dissolution of the attachment. So likewise does a finding in his favor on the issue raised by his denial of the ground for attachment set up in the affidavit, although the issue as to indebtedness may be decided against him. In either case the dissolution is accomplished through a trial of the merits. But it may be, and often is brought about through defects in the plaintiff's proceedings without test on the merits. Such defects are usually found in the two preliminaries to granting the writ, the affidavit and the bond, and the dissolution is procured upon motion based upon the defects. For instance, if the affidavit fails to allege, as required by statute, the nature and amount of the indebtedness, the defendant may move to dissolve the attachment, and if the affidavit is not amended within the time fixed by the court, the motion will be sustained. Again, if the bond be insufficient either because of defect appearing upon the face of it or because of insolvency of the surety, the defendant may move to dissolve the attachment, and if the plaintiff shall fail within such time as the court may fix to file a sufficient bond, the motion will be sustained.

49. **Same subject.**—In all the states there is allowed to debtors property to a certain extent free and exempt from execution and forced sale. Where

an attachment has been levied upon property so exempt, the defendant may secure its release on motion and satisfactory proof in support of it, irrespective of the question of indebtedness or the ground of attachment alleged.

A dissolution may be had because of failure of the plaintiff to file a declaration or petition setting forth his claim of indebtedness within the time required by the statute or rule of court. Substantial defects appearing on the face of the writ, if not cured by amendment, are sufficient grounds for dissolving the attachment. If the return shows that the levy was made by an officer not authorized by law or at a time not authorized by law, it may form the basis of a motion to dissolve. It should be observed, however, that defects which appear upon the face of the affidavit, the bond, the writ, or the return, excepting those which are jurisdictional, should be questioned at the earliest stages of the controversy, otherwise the defendant may be held to have waived them.

50. **Same subject.**—Upon the theory of the National Bankruptcy Act that the debtor's property is in the custody of the law for the pro rata satisfaction of the claims of his creditors, no lien of attachment can be acquired upon the property of one adjudged a bankrupt, and where his property is levied upon by virtue of an attachment sued out by one of his creditors, the attachment will be dissolved upon motion of the defendant or the trustee in bankruptcy.

As to the effect which the death of the defendant will have upon the matter of dissolving the attachment, the laws of the states are not uniform. In

some, his death pending the proceedings and before judgment dissolves the attachment lien in toto, while in others it continues as against his representative, provided the action be based on a claim that is collectible from his estate. Where the latter rule prevails, the administrator or representative is usually substituted as defendant.

In a few of the states the course of the proceeding is but little disturbed by the death of the defendant. In Wisconsin, for instance, if property shall be under levy of the writ and the defendant die pending the action or after judgment, execution may issue and satisfaction out of the attached property be obtained in the same manner as if the defendant were living.[10] Such statutes are exceptional, however.

51. **Dissolution as to others than the defendant.**— It is the duty of an officer attaching personal property to reduce the same to actual and visible possession so far as, under the circumstances, can be done, and continue such possession up to the time it shall be offered for sale upon the order of the court. If he do not he will be regarded as having abandoned his attachment, and his lien as to subsequent attachers, or purchasers in good faith from the defendant, will be lost.[11]

Where an officer suffered certain goods he had attached to be mixed with others of a like kind which had been attached by another officer who then returned an attachment of the whole by himself, it was

[10] Wisconsin Statutes (Mark's Revision of 1911), § 2751.

[11] See Nichols v. Patten, 18 Me. 231; Waterhouse v. Smith, 22 Me. 337; Baldwin v. Jackson, 12 Mass. 131; Sanderson v. Edwards, 16 Pick. 144 (Mass.).

held that the officer who permitted the goods he had levied upon to be mixed with the others had lost his special property in them and that the other officer was entitled to hold them.

It is often necessary for the officer to place the attached property in the hands of another as custodian. In such a case the lien is not lost, because the possession of the other is regarded as the officer's possession. But if the custodian abandon the property or allow it to come into the possession of an adverse claimant, or be attached by another officer, the lien of the first attachment will be lost.

52. **The effect of dissolving the attachment.**—An order of the court dissolving the attachment has the effect to free the property from the lien, and it is the duty of the officer to turn it over to the defendant, or to the one adjudged to be entitled to its possession, unless the judgment of dissolution be suspended by an appeal or writ of error.

If there has been personal service upon the defendant, or a voluntary appearance by him, the suit may proceed for the purpose of determining the matter of indebtedness. The dissolution merely defeats that particular writ and does not touch the merits of the main action or dismiss the cause. But if the service be by publication only, then, in the absence of a voluntary appearance by the defendant, the effect of the dissolution will be to dismiss the cause, because without the levy and custody of the property the court is without jurisdiction.

There may be dissolution as to part of the property and a continuance of the lien as to the rest. In such

a case, of course, the suit would proceed as to the unreleased part.

53. **Sale of attached property after judgment.**—We have already seen that where the property is of such perishable nature or of such character that the keeping of it will involve great expense, it may be sold and the proceeds held to await the final judgment of the court. Ordinarily, however, there can be no sale until the rights of the parties have been determined by judgment. If the defendant has been served with summons or voluntarily appears, the plaintiff on establishing his claim is entitled to a personal judgment against the defendant—a judgment which may be satisfied by an execution against any of the defendant's property. In a few of the states, a personal judgment has the effect to dissolve the attachment and release the property, so that it may become subject to general execution. But in the most of them it has no such effect; the lien of the attachment continues; the property is sold upon special execution and the proceeds applied to the discharge of the plaintiff's judgment. If the property be of a divisible nature, only such will be sold as will be sufficient to satisfy the plaintiff's judgment, and the officer will release the remainder to the defendant or to the person entitled to its possession.

54. **Duty of officer as to sale.**—As soon as judgment is rendered in his favor and an order for sale is entered the plaintiff has the right to have the property sold on execution and the proceeds applied to the satisfaction of his judgment. He may sue out the special execution at once and apply to the officer to

advertise and sell the attached property, and a failure to do so will make the officer and his bondsmen liable to the extent of the judgment when the same is less than the value of the property and to the extent of the value of the property if it be less than the amount of the judgment.[12]

Furthermore, the officer is liable to be fined for contempt of court for failing to perform his duty in that regard.

Having made the sale, it is the duty of the officer to apply the proceeds in satisfaction of the plaintiff's judgment and in such further way as the statute or the order of the court may direct. His failure to account for and so distribute the proceeds renders the officer liable to the attaching creditor and also to the defendant for the surplus, if any, above an amount sufficient to satisfy the judgment, or to any other person entitled to such surplus.

[12] See Weaver v. Wood, 49 Cal. 297; Whitney v. Farrar, 51 Me. 418; Blake v. Kimball, 106 Mass. 115; Trowbridge v. Bullard, 81 Mich. 451, 45 N. W. 1012; Wheeler v. McDill, 51 Wis. 356, 8 N. W. 169.

PART II

GARNISHMENT

CHAPTER IV.

NATURE OF THE REMEDY.

55. **Definition.**—Garnishment is a proceeding by which a party indebted to the defendant in an action or having in his possession effects of the defendant may be summoned into court and compelled to disclose the amount and nature of the indebtedness or effects, so that the same may be subjected to the payment of the plaintiff's claim. The person so summoned is called a garnishee. Regarding it in the light of an equitable proceeding to determine the ownership of a fund and make it available to discharge a debt of the original owner, it has in some of the Eastern states been denominated trustee process, and the person summoned is called trustee.

56. **Nature of the remedy.**—Although derived from a custom which at an early date obtained among merchants in London, it is not a common law remedy and would not exist in this country except for statute. While it is designed to accomplish the same purposes as an attachment, or execution, it is unlike either of those writs in that it does not authorize a levy upon property. In that it compels the garnishee to disclose under oath whether he is indebted

to the defendant or holds any of his effects the process partakes somewhat of the nature of a subpoena, and, as it warns him against paying the defendant what he may owe him or of disposing of the defendant's property that he may have, it partakes of the nature of an injunction.

Although it is a judicial proceeding against the garnishee which may result in a judgment against him it is not an independent suit. It is merely an auxiliary remedy open to a plaintiff to reach the property and credits of his debtor defendant when attachment and execution are unavailing. In that sense the law regards the garnishee as a mere stakeholder of the fund or property sought to be reached.

57. **Two kinds of garnishment.**—There are two kinds of garnishment, one available to the plaintiff before the recovery of judgment against the defendant, usually called garnishment in aid of attachment, and the other where the plaintiff has already recovered judgment, but is unable to obtain satisfaction by ordinary execution, usually called garnishment in aid of execution. An example of the former is where A at the time of suing out an attachment writ or summons against B, his debtor, makes affidavit that he believes some person, naming him, is indebted to or holds property belonging to B; whereupon the person named is summoned and compelled to answer relative thereto. An example of the other kind is where A, having recovered judgment against B, but unable to find property of B out of which to satisfy it by execution, makes affidavit that some person, naming him, is indebted to or holds property belong-

ing to B, whereupon the person named is summoned and compelled to answer.

58. **Distinction between the two kinds.**—Where one is summoned as garnishee while the suit is pending between the plaintiff and the defendant, and his answer shows that he is indebted to the defendant, judgment against him will be suspended until a determination of the main suit, and if it shall be decided against the plaintiff, the garnishee will be discharged; whereas, in case of garnishment in aid of execution, judgment will be rendered against the garnishee at once, as soon as it appears that he is indebted to the defendant. Again, in garnishment before judgment, the garnishee will be discharged notwithstanding his indebtedness to the defendant, and the subsequent recovery of a personal judgment in favor of the plaintiff against the defendant, if at the time there does not exist some statutory ground of attachment against the defendant; whereas, in garnishment after judgment the garnishee indebted to the defendant will be held, regardless of an existing ground of attachment.

59. **Persons subject to garnishment.**—The proceedings may be maintained against private corporations as well as individuals. Upon grounds of public policy they may not, in the absence of express statutory authority, be maintained against municipal corporations, such as counties, cities, townships, and school districts. For the same reason a municipal officer or agent is not subject to the process where he holds funds or property of the corporation in his official capacity. The interests of the public are

paramount to those of the individual and the time and attention of its officers should not be taken in proceeding for the collection of a debt in which the public is in no wise interested.

As a general rule, administrators and executors are exempt from the proceeding, although they may be held for distributive shares due heirs and legatees, after order of distribution has been entered in the court where the estate is being administered. In states where a married woman is by statute authorized to contract in her individual right and name she may be sued and held as garnishee.

Likewise, officers and agents of the government of the United States, the government of the individual states, and their officers and agents holding public funds or property are exempt from the process.

60. **Right of action by defendant against garnishee essential.**—In order that plaintiff may maintain his proceeding against the garnishee there must be a subsisting right of action at law in the defendant against the garnishee.[13] In other words, as the plaintiff seeks to avail himself of the rights of the defendant against the garnishee, his recourse against the latter must of necessity be limited by the extent of the garnishee's liability to the defendant. This principle is subject, of course, to exception where the garnishee is in possession of effects of the defendant under a fraudulent transfer from the latter. There, though the defendant would have no claim against

[13] Jefferson County Savings Bank v. Nathan, 138 Ala. 342, 35 So. Rep. 355; Earley v. Redwood City, 57 Cal. 193; Richardson v. Lester, 83 Ill. 55; Farwell v. Chambers Circuit Judge, 62 Mich. 316, 28 N. W. 859; McPherson v. Atlantic & P. R. Co., 66 Mo. 103.

the garnishee which a court would enforce a creditor of the defendant may subject the effects in the garnishee's hands to the payment of his claim.

61. **Garnishee's liability for property.**—The garnishee's liability may be considered under two heads: first, his liability in respect to property of the defendant in his possession; and second, his liability as a debtor of the defendant.

Under the first head may be considered what character of property belonging to the defendant, in the garnishee's possession, will make the garnishee liable. It is universally held that a debtor's interest in real estate cannot be reached by garnishment served upon the holder of the legal title; and of personal property it may be said that it must be such as is capable of being seized and sold on execution. For example, where a garnishee admitted that he had in his possession, when summoned, a horse of the defendant, but showed that the horse was by law exempt from execution against the defendant, he was held not to be chargeable. So one having in his possession a promissory note belonging to the defendant cannot in respect thereof be charged as garnishee. The maker of the note, if it is due, is the proper garnishee.

As a general rule, the property must be in the actual possession of the garnishee or within his control. Though not in his actual possession, if he have the right and the power to take immediate possession, he will be regarded as in possession. For example, if an agent of the garnishee should take possession of property belonging to the defendant pursuant to an agreement that the garnishee should hold

possession, the latter would be liable though the property had never been in his actual possession.

The possession of the garnishee must be of such character as to give the defendant the right to recover as owner. There must be a contract, express or implied, coupled with interest in the defendant whereby he has the right to recover the property for his own use.

A, receiving money from B, for the express purpose of paying off a mortgage upon the land of C, cannot be held as garnishee of C, because there is no privity of contract between A and C. Neither could he be held as the garnishee of B, because he holds the money for a specific purpose in the interest of C.

62. **Same subject—Trust funds.**—For the reasons above stated it is quite generally held that trust funds are not the subject of garnishment.[14] For example, where a person has been legally authorized to collect the debts due a firm and distribute the proceeds among the firm's creditors, a performance of the trust thereby created cannot be defeated by making him respond as garnishee in a suit afterwards brought by one of the creditors. The trustees of a legatee cannot be charged as garnishee in a suit against him, if charging them would defeat the bequest. But they might be so charged for a surplus remaining in their hands after an execution of their trust.

[14] White v. Jenkins, 16 Mass. 62; Brigden v. Gill, 16 Mass. 522; Peninsular Savings Bank v. Union Trust Co., 127 Mich. 355, 86 N. W. 798; Lackland v. Garesche, 56 Mo. 267; Sweet & Sweet v. Read & Richards, 12 R. I. 121; Chase v. Currier, 63 N. H. 90; Steib v. Whitehead, 111 Ill. 247.

If the relation of the defendant to the fund is that of a trustee and the person summoned as garnishee is the agent of the defendant to hold it, the fund is exempt from garnishment because only property and funds belonging to the defendant in his individual right may be reached.

63. **Same subject—Money in the custody of the law.**—In Massachusetts, at an early day, it was announced that a public officer having funds in his hands by reason of his official position cannot be held as a garnishee; and that doctrine, in the absence of express statutory authority, has been followed in all the states. Funds in the hands of the clerk of a court by order of the court cannot be reached by proceedings in garnishment by a creditor of a claimant to the funds. Funds in the hands of a receiver, appointed to wind up the affairs of an insolvent corporation, are exempt. His authority to collect the debts due the corporation and make distribution among its creditors is derived from the court and funds so collected cannot be disturbed except upon order of the court. Property held by an administrator or executor is in the same class. It is within the control of the court, to be used in paying the debts of the deceased, and for distribution among heirs or legatees.

A frequent application of the doctrine has occurred where attempts have been made to reach funds in the hands of a sheriff collected on execution. For example, on execution in favor of A against B the sheriff by levy and sale of B's property has received a fund which the writ directs him to pay to A. C, a creditor of A, cannot garnishee the fund.

64. **Same subject.**—Not as an exception to the rule, but as a limitation upon its operation, it is held that the exemption stated in § 63 ceases when the person holding the fund discharges his official duty with reference to it. For instance, in the example given about money collected on execution, while the sheriff could not be garnisheed by a creditor of A, he could be garnisheed by another creditor of B for any surplus remaining in his hands after paying A. The mandate of the writ was to make out of the property of B an amount sufficient to satisfy the judgment, and when that was done by sale of B's property and the payment to A of the amount of his judgment, the sheriff's right of custody ceased. B had the right to demand and sue for the surplus. The obligation of the sheriff to him was personal.

For like reason, it has been held that an administrator, after the estate has been fully administered, the share of each distributee definitely ascertained and an order for payment entered by the probate court, may be garnisheed by a creditor of a distributee.

65. **Garnishee's liability as debtor.**—Coming now to consider the garnishee's liability by reason of his indebtedness to the defendant, it may be observed that it is governed by many principles in common with those already mentioned under the other head, —his liability as a holder of the defendant's property. In practice, the most frequent resort to the remedy is where the garnishee is a debtor.

The aim of the proceeding being to invest the plaintiff with the right and power to collect from the gar-

nishee a debt due from the latter to the defendant and to appropriate it to the satisfaction of the defendant's debt to him, it is a controlling principle that the defendant shall have a cause of action, present or future, against the garnishee. It is in effect a suit by the defendant against the garnishee, for the use of the plaintiff, commenced and conducted without reference to the defendant's concurrence, and, in many instances, against his opposition, and in some jurisdictions, when the proceeding is commenced to collect an unsatisfied judgment already recovered by the plaintiff against the defendant it must be conducted in the name of the defendant against the garnishee.

66. **Same subject.**—In the absence of statutory exception, it is a general rule that the debt of the garnishee must be one that is payable in money.[15] Hence, when the garnishee acknowledged an obligation to the defendant payable in work and material, it was decided that he could not be charged. The basis for the rule is that the court has not power to interfere with the contract between the defendant and the garnishee and compel the latter to pay money when he is willing, perchance, to perform according to the terms of his obligation. Still, there is no reason why the garnishee should not be held where he has refused to perform and damages resulting from a breach of the contract are capable of being reduced to certainty by a definite standard.

[15] Mims v. Parker & Coffman, 1 Ala. 421; Avery & Sons v. Lockhard, 75 Ala. 530; Capes v. Burgess, 135 Ill. 60, 25 N. E. 1000; Wrigley v. Geyer, 4 Mass. 102.

As a general rule it is not necessary that the debt be due in order for the plaintiff to have judgment against the garnishee; but the issuance of execution and all steps to collect will be suspended until the date on which the debt becomes due.

67. **Same subject.**—The debt must be absolutely payable, however, at present or at some future time, and not be dependent on a contingency. If the contract be of such a nature that it is uncertain whether anything will ever be due under it, it will not constitute a credit subject to garnishment; for that cannot properly be called a debt, which is not certainly payable, either at the present or some future period.[16] For example, where a son gave a bond to his father for the payment of certain sums of money at fixed times in each year during his father's life, it was held that he could not be charged as garnishee by a creditor of the father for anything not payable at the time, all future payments being contingent upon the life of the father. So, where a bill is payable only on certain conditions or on a contingency, it cannot be reached prior to the fulfillment of the conditions or the happening of the contingency. So long as it is uncertain whether the garnishee owes the defendant he cannot be charged, as the plaintiff can have no greater right by subrogation than the defendant has directly against the garnishee.

68. **Same subject—Promissory notes.**—It is a general rule that the maker or endorser of a promis-

[16] Smith v. Gilbert, 71 Conn. 149, 41 Atl. 284; Williams Bros. v. Young, 46 Iowa 140; Sayward v. Drew, 6 Greenl. 263 (Me.); Grimsrud v. Linley, 109 Wis. 632, 85 N. W. 410; Evans v. Rector, 107 Wis. 286, 83 N. W. 292.

sory note cannot be made liable as a garnishee in an action against the payee prior to its maturity. An exception is made in a few jurisdictions to the extent that he may be liable provided it be made to appear that the paper has not passed into the hands of an innocent holder for value, without notice of the service of the garnishee summons. In all the states liability as garnishee will attach to him after maturity, provided the defendant is still the owner of the note.

The reason for the rule is to avoid the danger of the garnishee's having to pay the note twice. The obligation of the maker of a promissory note is to the holder. His promise is to pay to the payee or to any person to whom the payee may assign the note. The payee may assign it and thereby transfer the maker's obligation to a third party. That may be done without notice to the maker. If before maturity of the note a judgment in garnishment should be rendered against him and afterwards paid, he would still be liable to an innocent purchaser, who took from the payee without notice of the garnishment.

Again, while the maker of such paper knows that he owes somebody, it is not certain that he owes the payee named in it. How can he, when summoned as garnishee, answer that he owes the maker? Even if he knew at the time of being served with summons that the payee held the note, what assurance has he when judgment is moved for against him that the payee has not in the meantime by endorsement changed his obligation, so as to require him to pay to another party?

69. **Same subject—Co-debtors.**—Where several

persons are jointly and severally liable for a debt, any one of them may be held as garnishee for the whole debt. His liability in that regard is identical with what it would be in a suit by the defendant against him directly. In such a case, however, it is safer to proceed against all the joint and several debtors if they be within the jurisdiction of the court; for a payment to the defendant afterwards by one of the others without notice of the garnishment would release the garnishee.

Where the liability is joint merely, then all should be garnisheed; otherwise, the one served as garnishee will be discharged. But if part of the joint obligors reside out of the state, so that service may not be had upon them, the attaching creditor may obtain judgment against all who can be served, provided he includes all in his writ.

The decided weight of authority is that partnership credits cannot by garnishment be taken to pay the individual debt of a member of the firm.[17] To illustrate, A owes the partnership firm of B and C. B cannot maintain a suit upon the obligation against A, because A owes B and C jointly and not B individually. So, if D, a creditor of B, should recover judgment against the latter, which he is unable to collect by the ordinary process of execution, he could not through garnishment take what A owes B and C to satisfy the debt of B.

[17] Winston v. Ewing, 1 Ala. 129; Church v. Knox, 2 Conn. 514; Ripley v. Peoples Sav. Bank, 18 Ill. App. 430; George v. Wamsley, 64 Iowa 175, 20 N. W. 1; Stillings v. Young, 161 Mass. 287, 37 N. E. 175; Sheedy v. Second Nat. Bank, 62 Mo. 17; Lyndon v. Gorham, 1 Gallison 367, 15 Fed. Cas. No. 8640.

CHAPTER V.

MANNER OF ENFORCING THE REMEDY.

70. **Affidavit necessary to procure process.**—The application for garnishee summons, whether made before or after judgment by the plaintiff against the defendant, must be supported by affidavit. This is an absolute necessity, because the court can acquire jurisdiction only through process predicated upon affidavit. Also the record must affirmatively show that one was filed. A mere recital in the writ that one was filed is not sufficient.[18] If before judgment, the affidavit should contain all the essentials of an affidavit in attachment heretofore mentioned. In other words, it must set up the amount of the plaintiff's claim and some existing ground of attachment against the defendant. In some of the states the essentials for procuring an attachment writ and a garnishee summons may be embodied in one affidavit. In such case the attachment writ, in addition to commanding the officer to summon the defendant and to levy upon his property, will contain a command to summon the garnishee. If the application be made after judgment, the affidavit, as a general rule, must recite the recovery of the judgment, the issuing of an execution, the return of the execution unsatisfied, the want of property in possession of the defendant sub-

[18] Paine's Lessee v. Mooreland, 15 Ohio, 435; Wells v. American Express Co., 55 Wis. 23.

ject to execution and the belief of the plaintiff that the person named as garnishee is indebted to or holds property of the defendant.

71. **Same subject.**—The statutes differ as to what the affidavit should contain, and a good one in one state might be entirely insufficient in another. The remedy being one unknown to the common law, the affidavit should contain the statutory requirements of the jurisdiction where the proceedings are pending.

While the affidavit is usually sworn to by the plaintiff, the most if not all the states allow the plaintiff's agent or attorney to perform that office. Any number of garnishees may be embraced in one affidavit; and they may be proceeded against because of their joint liability to the defendant or because of their several liability. Corporations, partnership firms, persons not partners, but liable on joint obligations, and persons liable individually, may be named in one affidavit and proceeded against in one writ. Wherever a joint liability is claimed, however, it should be so stated in the affidavit.

Although the affidavit must be positive in reciting the amount and character of the indebtedness from the defendant to the plaintiff, the statement as to the liability of the garnishee to the defendant is sufficient, if made upon information and belief. The reason is apparent: The plaintiff is presumed to know all the facts which constitute his claim against the defendant, whereas no such presumption obtains against him with reference to the relations existing between the garnishee and the defendant.

72. **Bond.**—Where the proceeding is commenced before the recovery of judgment by the plaintiff against the defendant, it is in the nature of attachment, and in that case such bond as is required in attachment is required in most of the states. Such provision, it would seem, is a wise one, because injury to a defendant might arise from the wrongful suing out of garnishment process the same as in the wrongful suing out of an attachment writ. To illustrate: the seizure of the defendant's goods on a fictitious claim of the plaintiff or in case of a valid claim, where no cause of attachment exists, constitutes an injury. The wrongful tying up of a fund or property in the hands of a garnishee when the defendant is entitled to it is likewise an injury. The reason for a bond to indemnify the defendant is as strong in the one case as in the other.

But where the garnishment is commenced after the plaintiff has recovered judgment against the defendant, the proceeding is in aid of execution and so there would seem to be no necessity for a bond.

Where the statute provides for a bond the prime purpose is to secure the defendant against any damage that may result from delay or otherwise, and is regarded as a preliminary step to be made in order to give the court jurisdiction to appropriate the defendant's credits or property in the hands of the garnishee.

73. **The writ.**—A proper affidavit having been filed and bond executed, where the statute requires a bond, the next step is the issuance of the writ or notice to the garnishee. This being a ministerial and

not a judicial act, it is usually performed by the clerk of the court and follows as a matter of course. Its form and requisites are regulated by statute and in drafting it great care should be observed to see that the provisions of the statute are followed. In some jurisdictions, where the plaintiff proceeds in attachment before judgment, it may be embraced in the writ of attachment. In such case the writ, after directing the sheriff to summons the defendant and seize and hold his property, commands him to summons the garnishee named. In other jurisdictions, the garnishee summons is a separate and distinct writ.

In a few of the states the summons is issued by the plaintiff's attorney. Although it does not then appear so solemn an instrument as a writ issued by the court's clerk and bearing the court's seal, it runs in the name of the state to the garnishee and must be served by the sheriff or some other public official authorized to serve writs. Wherever that practice obtains, the affidavit is annexed to the summons. In substance, it commands the garnishee named in the annexed affidavit to appear within a date named and make full and complete answer touching his indebtedness to the defendant or his possession of any property belonging to the defendant.

74. **Service of the writ.**—In the absence of express statutory provision, service of a garnishee summons may be made by any person authorized to serve any other process in a personal action. The service must be personal, however. The garnishee must have actual notice by reading the summons to him, by leaving a copy with him, or by leaving a copy at his usual

place of abode in such manner as the local statute may require for getting personal service upon the defendant in an ordinary action at law. Service by publication will not answer.

A non-resident may be a garnishee, provided he is found within the state and served with process—because by being served within the state he is amenable to the jurisdiction of the court. In a few of the states it is held that a non-resident who is only temporarily within the state cannot be subjected to garnishment; but that is not the general rule, and in the absence of a statutory inhibition there appears no good reason for so holding. Of course, the court can exercise no control over property held by the garnishee out of the state, nor compel him to respond to the plaintiff on a liability to the defendant enforcible only in the garnishee's own state. But as to a debt which the garnishee owes the defendant, and for which the defendant may maintain an action within any state where he may obtain personal service upon the garnishee, why should the latter be exempt from this character of process solely because his presence in the state is temporary?

75. **Same subject.**—If the defendant is within the jurisdiction of the court, so that service can be had on him, he should be notified, because he has the right to appear and assert any claim of exemption or otherwise that he may have in the matter. In fact, some of the statutes require the garnishee summons to be served upon him just as it is served upon the garnishee, or to show some sufficient reason why it cannot be served.

It is the duty of the officer to endorse upon the summons the manner in which he has served the same, and where that does not appear it will work a discharge of the garnishee and render void any proceedings that might be entered against him because of failure to answer.

76. **Amendments.**—The affidavit, writ, bond, summons, and officer's return are open to amendment under the rules which obtain in applications for amendment of those instruments in proceedings by attachment. As the rules governing such applications were fully considered in Part I, Chapter III, they will not be again discussed at this place. The reader is referred to §§ 43-47, and the entire subject of amendment is dismissed with the statement that all proceedings in garnishment are open to amendment to the same general extent that proceedings in attachment are.

77. **Answer of the garnishee.**—On having been served with summons, it is the duty of the garnishee to answer. The answer is usually required to be on oath and should disclose all the facts touching his liability to the defendant to the end that the court may decide intelligently. A failure in that regard might result in his being charged when he ought not to be, or of his escaping liability when he ought to be charged.

Under the practice in a few of the states, he files one answer in which he sets forth the facts showing his relations with the defendant, much like the answer of a defendant in a suit in equity. In other states, special interrogatories are filed by the plaintiff and

to each one of them the garnishee is required to make a distinct answer. Whichever practice prevails, he must disclose all the facts accurately and distinctly.

If he holds the fund sought to be reached in trust, he should disclose that fact and resist judgment upon that ground; otherwise, should a judgment be rendered against him he could be compelled to pay again by the party for whom the trust fund was created. If the fund is in the custody of the law, as heretofore explained, he should set that forth. In short, if he knows of any fact that should exempt the fund from attachment by the plaintiff, or of any fact that has destroyed the relation of debtor and creditor previously existing between him and the defendant, he should disclose it.

78. **Same subject.**—He is not confined to his personal knowledge of facts. Information received from others, if of a reliable nature and believed in by him, should be stated. But he should avoid evasion and equivocation. An evasive answer will be treated as a nullity and any equivocation will subject the whole answer to suspicion. The important points to be attained are fullness and explicitness. In accordance with a universal rule of the courts, ambiguous and misleading statements will be construed against him.[19] This works no hardship. Opportunity has been given him to collect the facts and to mature his responses. While in one sense his position may be regarded as that of a witness, he must in

[19] Parker v. Page, 38 Cal. 522; Brainard v. Shannon, 60 Me. 342; Reinhart v. Empire Soap Co., 33 Mo. App. 24; Dawson v. Maria, 15 Ore. 556; Sampson v. Hyde, 16 N. H. 492; Grever v. Culver, 84 Wis. 295.

another be regarded as a defendant. In effect he is a defendant, because the proceeding is to collect by court action a debt which it is alleged he owes the defendant.

If the garnishee be a corporation, the answer may be made by an officer conversant with the facts, and in most of the states it may be made by any agent or attorney of an individual garnishee, provided he shall be acquainted with the facts.

79. **Same subject.**—Where interrogatories are used, a wide range of latitude is usually allowed in endeavoring to ascertain whether the garnishee can be made liable. Almost every variety of question bearing upon this point may be asked and an answer compelled. Still there must be a limit. The interrogatories must be confined to such matters as under the law necessarily involve the garnishee's liability. Thus, where a justice of the peace was made a garnishee and the question was put to him how many judgments were entered on his docket in favor of the attachment defendant, when, against whom, and for what amounts, it was held that the question was improper for the reason that it did not involve liability on the part of the garnishee.[20]

The court will protect the garnishee from answering impertinent questions and especially such as involve disclosures touching his guilt in the violation of a public law.[21] Thus, when a garnishee was asked whether he had not received usurious interest of the

[20] Corbyn v. Bollman, 4 Watts and Sargeant 342 (Pa.); Lyman v. Parker, 33 Me. 31.

[21] Crossman v. Crossman, 21 Pick. 21 (Mass.); Boardman v. Roe, 13 Mass. 104.

defendant, it was held that he could not answer affirmatively without criminating himself and, therefore, should not be compelled to respond.

80. **Answer before a justice of the peace.**—In those states where garnishment proceedings may be had before a justice of the peace written interrogatives, as a general rule, are not required there. The garnishee is examined orally and the answers are oral. The same rules apply, however, that apply where written answers are required. The garnishee is charged with the same duty as to making disclosure and is entitled to the same protection that he would be in a court of record.

81. **Effect of the answer.**—Under some of the early statutes the answer was conclusive of the facts alleged and could not be controverted; but the more recent statutes provide that the plaintiff may, at his option, traverse the answer and have an issue made up for trial by a jury. The modern rule is that the answer is presumed to be true, and will stand as such until overcome by competent evidence.

Whenever the plaintiff shall be of the opinion that the garnishee has not truly answered he may notify him that he elects to take issue on his answer. His election is indicated to the court by motion, affidavit, or in such other manner as the statute may prescribe, and a jury is empaneled to try the issue. Evidence will be heard and the trial will be conducted just as it would be if the suit were one by the defendant against the garnishee.

In the trial the garnishee may avail himself of all the defenses he could in a suit brought directly

against him by the defendant. Thus, if the garnishee have a counter-claim against the defendant it may be set off; if the consideration for the obligation has failed, or the claim be barred by the Statute of Limitations, it may be shown. If he so desire, the garnishee may defend the principal action against the defendant.

82. **Same subject.**—Where the garnishee admits a debt to the defendant, judgment will be rendered against him as a matter of course, if judgment shall already have been recovered by the plaintiff on his claim against the defendant. Otherwise, judgment will be deferred until that issue shall be decided. To illustrate: A having recovered judgment against B and being unable to collect it by means of execution, garnishees C who admits a debt to B; judgment for the amount of the debt should be rendered against C at once. But if suit between A and B is still pending, judgment against C will be deferred until A shall recover against B. In the event of A failing to recover judgment against B, C will be discharged.

In case the garnishee is found to be indebted upon trial of issue raised by a denial of the answer, the entry of judgment against him will be made or deferred in same manner as where admitted.

83. **Right of defendant and others in the proceeding.**—The defendant, if he so desire, may appear and defend the proceedings upon the ground that the debt of the garnishee or any property held by him is exempt from execution against the defendant, or that for some other reason it is not liable to garnishment. He may participate in the trial of any issue between

the plaintiff and the garnishee for the protection of his interests.

Any person claiming the fund or property in the garnishee's possession may appear and assert his claim by interpleading and thereby raise an issue as to his rights. If the evidence shows that the fund or property is his, and not the defendant's, the court will so declare and discharge the garnishee. In some states the statute provides that if the garnishee's answer discloses that some third party claims the fund, such party may be brought into court by process and compelled to set up his claim. The modern tendency is to have all disputed claims and rights to the fund or property, whether asserted by the garnishee, the defendant, or some third party, settled in one suit.

Any party to the record, plaintiff, garnishee, defendant or claimant, if dissatisfied with the decision of the court may appeal to a higher court and have the proceedings reviewed in the same manner as, under the statute, other proceedings may be reviewed.

84. **Refusing or neglecting to answer.**—A garnishee refusing to answer may be considered in contempt of court and dealt with accordingly. But the usual course is to enter a conditional judgment against him for the full amount of the plaintiff's established demand, the presumption being that the garnishee is indebted to the defendant to the full amount of the plaintiff's demand. In most of the states, however, the judgment is not final. After it is entered another writ, called a writ of scire facias, issues which calls upon him to show why the judg-

ment should not be made final. It is made returnable at the next term of court, or to a day fixed by the judge, at which the garnishee may answer and put in a defense, as he could have done in the first instance. If he fails to answer, then the judgment will be made final—depending, of course, upon the establishment of the plaintiff's claim against the defendant.

85. **Judgment against the garnishee.**—It is provided in some of the states that the garnishee may, after filing answer showing that he owes the defendant, or has in his possession property belonging to him, exonerate himself from further liability by paying the fund into court or delivering the property to the officer.

Where there is no such provision, or there being one the garnishee does not avail himself of it, judgment will go against him as heretofore explained. In some of the states it is held that the judgment should be entered in the name of the original defendant for the use of the plaintiff. This is logical because the proceeding is really a suit to determine the garnishee's liability to the original defendant.

The judgment against the garnishee must be for a sum certain. In no event may it be greater than the amount recovered by the plaintiff against the defendant. Thus, although the garnishee admit an indebtedness of $1,000 to the defendant, if the plaintiff recover a judgment against the defendant for $500, a judgment against the garnishee for $500 only should be rendered and he would be answerable directly to the defendant for the overplus.

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Drake on Attachment is a standard work. Other good treatises are *Wade* on Attachment and Garnishment; *Waples* on Attachment and Garnishment; *Shinn* on Attachment and Garnishment.

As attachment proceedings are largely regulated by statute, the student is advised to read, in connection with this article, the statutes of his state upon the subjects of attachment and garnishment.

LAW OF JUDGMENTS AND EXECUTIONS

BY

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PART I

JUDGMENTS

CHAPTER I.

NATURE AND ESSENTIALS.

1. **In general.**—The judgment is the last step in the following series: A suit is instituted in a court to determine the rights of conflicting claimants in some matter; the appearance of the defendant and his subjection to the jurisdiction of the court are obtained by his voluntary appearance or by service of process on him; the matter to be decided is presented by the pleadings to the court for decision; the evidence to establish and refute the claim is submitted to the court; the case is argued; the verdict of the jury is rendered, if there be a jury, or if not,

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the court finds the facts; the next step is the conclusion of the law from all this, and this conclusion to be drawn by the court is called the judgment or decree. A word or two as to what the judgment is not may help to understand what it is. The judgment is not the reason given by the court for deciding the case as it does, sometimes called the opinion; it is not the ruling of the court on the admission of offered evidence; it is not the instruction given to the jury to enable it properly to pass on the evidence; it is not the finding of facts by the court or jury from the evidence submitted; it is not the entry made by the clerk on the records of the court as to what was decided; no interlocutory order made by the court during the progress of the cause, such as that security for costs be given, or that the case be continued over to the next term, is a judgment; but the judgment is the final disposition actually made of the case by the court, as a result of all that precedes.

When analyzed, a judgment is reached thus: (1) the pleadings—A says that B took A's cow and converted it to B's own use, wherefore A is damaged to the extent of $50, to which B makes a general denial; (2) the verdict or finding of facts—the jury says that from the evidence adduced it appears and the jury finds the facts to be as A has said; (3) the judgment—"wherefore it is considered and adjudged by the court now here that A do recover of B the sum of $50 damages, together with his costs to be taxed, and that he have execution therefor." A judgment, therefore, may be defined to be the sentence of the law, as declared by the court, upon the

matter submitted to it for decision by opposing claimants.

2. **Elements of jurisdiction.**—Jurisdiction is the authority to hear and determine; and in order that it may exist the following are essential: (1) a court created by law, organized and sitting; (2) authority given it by that law to hear and determine causes of the kind in question; (3) power given it by law to render a judgment such as it assumes to render; (4) authority over the parties to the case if the judgment is to bind them personally as a judgment *in personam* (against the person), which is acquired over the plaintiff by his appearance and submission of the matter to the court, and is acquired over the defendant by his voluntary appearance, or by service of process on him; (5) authority over the thing adjudicated upon by its being located within the court's territory, and by actually seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the question being submitted to it by the parties for decision.

Looking over the foregoing six essentials it will be noticed that the first three are matters of law, and the last three matters of fact. The law essentials are determined by examination of the law books in which are contained the statutes creating the court and defining its powers. The fact essentials of jurisdiction are determined by examining the pleadings and papers in the case, to determine whether the parties all appeared or were served, to determine whether the judgment assumed to be rendered is responsive to the prayer for relief in the complaint

or exceeds or departs from it; and by examining the facts outside of the record to ascertain whether as a matter of fact the thing was within the court's territory.

3. **Same subject—Illustrated.**—Take a supposed case, and analyze it for the purpose of determining whether these several essentials are present. A sues B in a justice court for taking A's cow and converting it to B's own use, wherefore A prays that he be awarded damages against B in the sum of $50.

1. The first essential of jurisdiction is that there be a court created by law, organized and sitting. On inspecting the statutes we find that the legislature has created such a court, and on inspecting the situation we ascertain that the person assuming to act as justice in the case was at least de facto such officer, though not perhaps duly elected.

2. Looking at the statutes again, we see that justice courts may hear and determine actions for conversion of goods. A court of purely criminal jurisdiction could not do that. The court created to administer the estates of deceased persons, pass on the accounts of guardians and control their actions, and to determine who is sane and who insane, usually is not authorized by statute to try cases such as this.

3. Examining the statute once more, to see whether it authorizes a justice court to give a judgment for damages to the sum of $50, we find that such authority is given. Observe that the point now under discussion is not whether the facts alleged in the pleadings, or the evidence given at the trial, warranted the court in giving such a judgment. The

question is not whether the court was warranted in giving such a judgment in this case, but whether it was authorized to give such a judgment in a proper case. Whether this is the proper case for such a judgment is for the court to say; and if in this the court errs, the judgment is not void, it is merely erroneous and liable to be reversed on appeal, if appeal lies. Until and unless reversed it is as binding as if it were perfectly regular and proper.

4. Turning to the files and record in the case, we find that the plaintiff appeared and submitted himself to the jurisdiction of the court by requesting the summons to the defendant to issue; and that jurisdiction over the defendant was obtained by a summons being issued and served on him by a constable, commanding him to appear and defend.

5. As to whether the cow was within the court's territory, that is immaterial in this case, since the court is not asked to render a judgment affecting title to the cow, but only a judgment for damages. Neither the title to nor the possession of the cow is to be affected by the judgment. It is to be a judgment in personam merely, that is, against the defendant personally. If it were in replevin for the cow, then it would be important to determine whether the court had jurisdiction of her.

6. As we look at the pleadings to ascertain whether the court was asked to give such a judgment as was rendered, it appears that the plaintiff prayed for a judgment in damages. Therefore, the court had power to award damages. It is not material that neither the complaint or declaration of the plain-

tiff nor the proof at the trial showed that he had any title to the cow, or that she was worth $50, or that he had suffered any loss by reason of her being taken by the defendant; nor is it material that he did not show that the defendant took her. On a demurrer to the pleading for defect in any of these respects, or on a motion to render judgment for the defendant at the close of the plaintiff's proof at the trial, these points would be material. But in the matter of jurisdiction the question is not whether a cause of action is stated or proved, but whether the relief given was prayed for. It may be that in a suit by a man against his wife praying cancellation of a deed he had executed to her it appears that grounds for divorce exist. But a decree of divorce in such a suit would be merely void, not because the court has no power by law to give such a decree, for the court that can vacate conveyances is usually empowered by law to grant divorces, but because such a decree would not be responsive to the prayer in this particular case. These elements of jurisdiction will now be examined in detail.

4. **Nature and essentials of a court.**—Since a judgment is a sentence of the law pronounced by the court it is necessary to inquire what a court is.

Created by law. A court is an institution created by law to decide between opposing claimants as to alleged wrongs, property rights and personal rights. Since a law is a rule of action, prescribed by the supreme power in a state, it follows that an institution created by the supreme power for the time being for this purpose is a court.

Overpowering force of rebellion. It may be that this power is illegitimate, rebellious, and treasonable; but there is no alternative. If justice is to be had at all it must be had at the hands of the powers that be. The judgments of their tribunals must be respected or the people of the unfortunate community denied all justice until lawful order can be restored. During the war between Texas and Mexico, a Mexican court adjudicated the title to land lying in the district afterward acquired by Texas, and this judgment was later offered in evidence in a Texas court as part of the chain of title to this land. In holding this judgment binding, the Texas court said: "The essential good of the nation and the peace and tranquillity of its citizens in relation to a branch so important as the judicial demands that those (judgments) should be legalized and be held as valid and subsisting; since if it were not so, a door would be opened to an innumerable multitude of complaints, reclamations, and attempts to undo all that had been done, so that nothing would be solid and stable. The fortune and property of the citizens would be consumed in the renewed expenses and damages which a multitude of suits would inflict; and the people would be buried in a terrible chaos of judicial anarchy, more transcendental and pernicious than the illegitimate dominion which it was designed to repudiate."[1]

Exceptions. But when the judgment of such a court is offered in evidence in another country, whether it will be given effect depends upon whether

[1] Trevino v. Fernandez, 13 Texas 630.

that government has been recognized by the government of the state in which the last court sits.[2] And even in the same country, the legitimate court cannot recognize the acts of the rebellious government's court in so far as it determines rights of the lawful government or sanctions acts prejudicial to it. Thus, when investment by a guardian of his ward's funds in Confederate bonds was brought before a court after the close of the American rebellion, the order of the Confederate court confirming the investment was held to be no defense to the guardian, when sued by his ward in a United States court, because to sanction the investment in the rebellious government's bonds would be prejudicial to the government of the United States.[3]

Unconstitutional. While a court is an institution created by the supreme power in a state, it is the better opinion that the fact that the statute creating a court is unconstitutional is no ground for attacking the court's judgments collaterally. It would be a misfortune to litigants who have gone to great expense trying their cases in that court, and perhaps obtained as substantial justice as they would before any legitimate court, to find that their rights were in no way settled. Titles to property of great value might be rendered uncertain long after the judgment was given, if it were held that the effect of the judgment would be thus entirely destroyed. Public policy demands that judgments rendered by courts

[2] Nueva Anna and The Libere, The Spanish Consul, Claimant, 6 Wheat. 193 (U. S.).

[3] Lamar v. Micou, 112 U. S. 452, 5 S. Ct. 221.

actually sitting under an assumed authority, although illegal, shall be recognized as valid, though afterwards the statute creating the court may be held to be unconstitutional.[4]

5. **Nature of the business.**—Courts must be distinguished from various other branches of the government, created for other than judicial purposes. A court is an agency of the state created to decide disputes between contending litigants. Other agents of the state have power to take testimony, swear witnesses, punish for contempt, hold their sessions at prescribed times and places, keep records of their doings, have a seal, and even pass upon claims. For example, the county board of supervisors sits at the county seat, has a seal and a clerk, keeps records of its doings, can subpoena witnesses, take testimony, punish for contempt, and audit claims against the county; yet no one would think that a board of supervisors is a court. The same may be said in a large degree of school inspectors, assessors, and other ministerial officers and boards. But all of these bodies act of their own motion, instead of the action being instituted by the complaint of one person filed before them requiring the answer of another. They do not act and decide between opposing claimants after hearing. They take such testimony as they please, or act without any testimony at all and upon their own information.[5]

6. **Organization and qualification of officers.**—Although there be a law creating such a court, there

[4] Burt v. Winona & S. P. Ry. Co., 31 Minn. 472, 18 N. W. 285.
[5] Stenberg v. State, 48 Neb. 299, 67 N. W. 190.

is in fact no court until the judge has been elected, a court organized and assembled. To constitute a court, therefore, there must be officers, time and place of sitting. If one acts who is not and does not claim to be a judge at all, but acts merely by reason of the claim being submitted by the parties to him for decision, his decision is not a judgment; but if he assumes to be the court and sits as such he is a de facto officer, and his decision between the parties is binding upon them though he may not be qualified to act as judge. His right to sit and decide cannot be questioned collaterally. To this there is some dissent, but it is the better view.

7. **Time of sitting.**—No court can be held on Sunday nor on certain holidays, and any attempt to pronounce judgment at such a time would be ineffectual and the judgment void.[6] Certain courts hold sessions continuously except on holidays. But other courts have terms in which they sit, and other periods in which there is vacation. If the judge assumes to decide a case during vacation, even with the consent of the parties, his determination upon it is not the judgment of the court but merely the act of this individual judge. Judgment can neither be rendered nor vacated by the judge during vacation time.[7] Of course the legislature may, by special act, authorize judgment by confession to be entered in vacation time, or authorize the judge to vacate judgments during vacation time; but in the absence of statute there is no such authority.

[6] Hemmens v. Bentley, 32 Mich. 89.
[7] Gamble v. Buffalo, 57 Neb. 163, 77 N. W. 341.

Courts' terms last from the beginning of the term until the beginning of the next term, unless sooner adjourned *sine die* (without day). The courts may adjourn the business from one time to another, and hold adjourned terms. During term time the court is in theory of law continually in session. The recess from the closing of business at night until court opens the next morning is not vacation time. Court can reassemble at any time from the beginning of the recess until the time appointed for reassembling. For example, a court was adjourned to reassemble at ten o'clock the next morning. Before that hour arrived parties desiring to take judgment by confession, stopped the judge in the corridor and induced him to indorse on the papers the memorandum: "Enter Judgment, E. Anthony, Judge." The clerk of the court entered judgment at large and issued execution before ten o'clock that morning. Under this execution property was levied on. On motion to quash the execution it was urged that there was no judgment because it was entered when the court was not in session; that it was the act of the judge only. The defendant also offered affidavits to show that the execution was issued before the entry at large on the record was in fact made, and argued that, therefore, there was no judgment on which the execution could issue. But the court held that the judgment was the sentence as declared by the court and not the record written by the clerk; that there are no fractions of a day; and that recess is not vacation time. The motion was denied and the court said: "The rule of the law is that the court is open from the first day of

the term as fixed by law until it is closed by the expiration of the term or adjourned sine die, and the term, though running through several weeks or months, is to be regarded as one day."[8]

8. **Place of sitting.**—Courts must sit within the territory over which they have jurisdiction, and usually the law prescribes certain places for holding court. The chief court of the county is usually held at the county seat, a place designated by law. The place of holding justice court is usually determined by the wish of the justice himself. He can establish his office where he pleases within the township in which he is authorized to sit. But there are also statutes in most states restricting the place of sitting, and declaring, for instance, that he cannot hold court in any place where intoxicating liquors are sold. If a witness is too ill to attend court, the judge may adjourn and take his testimony at his bedside in a place where a court might have been established. But if a justice of the peace attempts to decide a case without assembling court, it could hardly be said that he is the court. The justice is not the court wherever he goes, and at all times. Thus, judgment entered by a justice of the peace upon a note on which suit had been brought before him, stating that he met defendant while crossing the street and he confessed judgment, without anything to show that the court ever assembled at any place at all, was held void.[9] When a probate court assumed to sit at a town other than the county seat the judgment rendered by it

[8] Jasper v. Schlesinger, 22 Ill. App. 637.
[9] Tenny v. Filer, 8 Wend. 569 (N. Y.).

in so sitting was held to be void on collateral attack.[10] But if the courthouse should burn down or for any reason be unsuitable for court to sit in, undoubtedly the court could assemble on the courthouse square, or in some adjoining building in the same town, and its determinations would not be subject to collateral attack on the ground that it did not sit at the place prescribed by law.

9. **Power to try such causes and give such judgments.**—All courts from the highest to the lowest are more or less limited in their jurisdiction as to the causes which they may hear and determine, such as civil or criminal, legal or equitable, such as arise on navigable waters, or such as relate to the disposition of the estates of deceased persons. Jurisdiction in this respect does not depend upon the facts alleged, but upon the relief prayed for. The jurisdictional question is: Can this court give such relief in any proper case? Whether the allegations and proof show this to be a proper case is not a jurisdictional question.[11]

Every court has jurisdiction to decide every fact necessary to the determination of the cause before it. For example, every court can ask and determine whether John Doe was at a particular time sane or insane. This fact may become material in a criminal court in determining whether he is liable criminally for an act that he has done; in a civil court in determining whether he is liable on a contract he has made; in a probate court in determining whether the writ-

[10] White v. Riggs, 27 Me. 114.
[11] Hunt v. Hunt, 72 N. Y. 217.

ing he made was entitled to probate as his will; in a court of chancery in determining whether the deed he made while in this condition should be set aside. Every court can decide every fact necessary to determine whether the prayer should be allowed in the particular case before it. One court has jurisdiction in criminal cases, another in civil cases; each in its sphere has jurisdiction of the subject matter. But the facts and the acts of the party proceeded against may be the same in a civil case as in a criminal case; as, for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. Yet the court of civil power has no jurisdiction of the criminal action, nor vice versa, though each has power to pass upon allegations to the same facts.

10. **Same subject—Depends on law defining powers and not on facts.**—Jurisdiction in this respect can be determined by examining the law under which the court is organized and acts. For example, power by law to adjudge divorce from the ties of matrimony gives jurisdiction to decree divorce. Though the proceedings before the court from first to last of the testimony in an application for divorce should show that a state of facts does not exist which make a legal cause for divorce, yet it cannot be said that the court has no jurisdiction to render a decree for divorce. This element of jurisdiction is the power to adjudge concerning the general question involved, and it is not dependent upon the state of facts which may appear in a particular case, arising or which is claimed to have arisen under the general question. Juris-

diction is the power to act upon the general and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power.

If a suitor in an action for divorce does not establish a cause for divorce, jurisdiction to pronounce divorce does not leave the court. When he prays for divorce it is for the court to say whether he is entitled to it, provided it is a court authorized to give such a judgment in a proper case. If a court errs in granting divorce when it should not, as when no cause for divorce is either alleged or proved, the decree of divorce thus given is not void, but at most merely erroneous. On appeal it would be reversed, but on any collateral attack, it is conclusive.

11. **Same subject—Why so.**—Any other rule would render all judgments of no avail and all litigation endless, for whenever any judgment or decree was offered in evidence it would be open to the court in which such decree was offered to inquire whether the proof and allegations in the prior case justified the court in rendering the decree or giving the judgment it did. The result would be that whenever any judgment was offered in evidence the case would then be again tried. The judgment would amount to nothing, and so the next judgment would also amount to nothing. There would be no end to litigation. Hence, the only rule by which disputes can be put at rest is the rule which declares that when the court having power to try such a case and having the parties before it, gives judgment, that judgment shall be held binding until set aside by appeal or

other proceedings.[12] Thus, when a bill filed in chancery, under a statute empowering the court to entertain such bills, did not allege that the plaintiff was in possession of the premises,[13] it was held that a decree rendered in favor of the plaintiff quieting the title was valid and not subject to collateral attack, though bills had often been dismissed in the same supreme court for failure to allege such fact in actions to quiet title. The fact was essential to a cause of action, but not essential to jurisdiction of the court to decide the case.

While jurisdiction in a proper sense means authority to hear and decide a cause, it is common to speak of jurisdiction in equity, or of the jurisdiction of the court of equity, as not relating to the power of the court to hear and determine the cause, but relating to whether it ought to assume jurisdiction, and hear and determine the cause.

12. **Jurisdiction of the person.**—It is a rule founded on the first principles of natural justice that no person shall be condemned till he has had an opportunity to be heard. Any sentence pronounced against him without giving him such opportunity amounts to nothing but an arbitrary edict, and is entitled to no respect in any tribunal assuming to act on the principles of justice. If a party voluntarily appears and submits to the court's jurisdiction, there is, of course, no need of notice to him for the purpose of giving him an opportunity to be heard. It has been held in England that citizens of a country

[12] Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129.
[13] Figge v. Rowlen, 185 Ill. 234, 57 N. E. 195.

are so far bound by allegiance that service of process on them according to the law of that country, by calling them in the market square and at the wharf, gives the court jurisdiction over their persons, and enables it to give binding judgment in personam against them though they were in fact beyond the sea at the time, and never heard of the proceeding.[14] Also similar views have been expressed by several of our state courts on service according to statutes providing for service at the last place of residence, or by delivery of a copy of the process to some member of the defendant's family, though he never in fact received such notice.[15] But when a judgment on such service came collaterally in question before the Supreme Court of the United States it was declared void; and the court said: "Whether they all resided within the territory or not does not appear, nor is it a matter of any importance."[16] From this decision it would seem, and on principle it is believed, that the same rule should apply as to what constitutes due process of law to obtain jurisdiction in personam, whether the defendant be citizen, alien, or resident of some other state.

13. **Same subject—Non-residents.**—Judgments against others than citizens on service of the sort above mentioned, though according to the law of the state where the court rendering such judgment sits, are in England held entitled to no respect in any other country, except as a proceeding in rem affecting prop-

[14] Douglas v. Forrest, 4 Bing. (13 E. C. L.) 686 (Eng.), action on a Scotch judgment.

[15] Nelson v. Chicago, B. & Q. Ry. Co., 225 Ill. 197, 80 N. E. 109.

[16] Webster v. Reid, 11 How. 437 (U. S.).

erty actually the subject matter of such prior suit, and within the court's power at the time of rendering judgment on it.[17] When judgment against a non-resident has been rendered in personam on such service, it has sometimes been said that a personal judgment so rendered has no binding force outside of the state in which it is rendered, implying that in such state it may be valid and binding. In speaking of such a judgment the Supreme Court of the United States said: "But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and consequently no authority to pass upon his personal rights and obligations; if the whole proceeding, without service of process upon him or his appearance, is *coram non judice* (not before the court) and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice—it is difficult to see how the judgment can legitimately have any force within the state. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the state where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any state of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is

[17] Buchanan v. Rucker, 9 East 192 (Eng.).

not entitled to any respect in the state where rendered. Be that as it may, the courts of the United States are not required to give effect to judgments of this character when rights are claimed under them. * * * Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance."[18]

14. **Same subject—Exceptions.**—The propositions announced in the preceding section must be taken with certain qualifications, as stated by the

[18] Pennoyer v. Neff, 95 U. S. 714, 732, 733.

court in the case just quoted from. The court said: "It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. * * * Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforcible there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way; and that the judgments rendered upon such service may not be binding upon the non-residents both within and without the state. As was said by the Court of Exchequer in Valles v. Dumergue:[19] 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed,

[19] 4 Exch. 290 (Eng.).

even though he may not have actual notice of them.' We do not doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions hold their interests subject to the conditions prescribed by law."[20]

15. **Same subject—Service on corporations.**—The correctness of the propositions announced above as to service on corporations is now fully established. By consenting to be a corporation under the law of the state they consent to the mode of service provided by that law. Though organized under the law of some particular state they can do business in any other state only by complying with and assenting to the conditions imposed by the law of that state. By consenting to do business there they consent to be bound by the mode of service prescribed by the law of that state, and they are bound by such consent.[21] But if they do no business there, they are not bound by service on their officers while the latter are casually there on their private business. The officer does not carry his official capacity with him to another state merely by going on his private business.[22]

16. **Jurisdiction of the thing.**—If in a court of one state in a suit between A and B judgment is given

[20] Pennoyer v. Neff, 95 U. S. 714, 734-736.

[21] St. Mary's Franco-American Pet. Co. v. West Va., 203 U. S. 183, 27 S. C. R. 132.

[22] St. Clair v. Cox, 106 U. S. 350.

that land in another state belongs to A and not to B, such judgment would not be binding on B in the courts of that other state. This is for the reason that a court cannot act so as to bind a thing beyond its territorial jurisdiction. But if a court of one state exercising equity powers should compel B to execute a deed of the land to A, this deed would pass title to A, and would be entitled to respect in the courts of the other state. This is because a court having jurisdiction of a person may compel him to do something concerning a thing beyond the control of the court.[23] On the other hand, the personal obligations of persons follow them wherever they go, regardless of where they live, where the obligation was contracted, or where it is payable. Therefore, if A and B live in Chicago, and there B makes A a promise for value to pay A money there, and later A sues B in New York on that promise and recovers, or fails to recover judgment on it, that New York judgment is binding between both as to their rights on that matter; and the courts of Chicago and all other places are bound to respect it.[24]

But to make a judgment binding as to a tangible thing in rem this res must be located within the court's territory and be a subject matter of the suit. A court may obtain jurisdiction to render judgment merely in rem without any process being personally served on the persons interested in the thing. For example, a court of probate may decree that such an

[23] Penn v. Lord Baltimore, 1 Ves. Sr. 444 (Eng.); Lindley v. O'Reilly, 1 L. R. A. 79, 7 Am. St. Rep. 802.

[24] Balk v. Harris, 198 U. S. 215, 25 S. C. R. 625.

instrument is the will of the late John Smith without any notice personally served on the heirs of John Smith within the court's territory to appear and defend the suit. The title of the case and the papers in the cause need not even mention their names or suggest that they are interested in the proceeding. On the other hand, it is indispensable that some notice to them to appear and defend, or to all persons interested to defend, shall be given by publication or otherwise; and that notice must be reasonably adapted to reach them and bring them into court.[25]

17. **Jurisdiction of the question.**—Since courts are created to decide controversies submitted to them for decision, they cannot decide what is not submitted; they can give only the relief prayed for. In so far as they attempt or purport to do more, their judgments are absolutely void. This principle may well be illustrated by a case before the Supreme Court of the United States. Hope Life Insurance Company deposited funds with the New York commissioner of insurance to secure payment of its policies, and later reinsured its liabilities in the Mutual Life Insurance Company of New Jersey. Afterward Joel Parker was appointed by the Chancery Court of New Jersey receiver of the latter company, and later was appointed ancillary receiver by the Supreme Court of New York for its affairs in New York. Reynolds and others brought suit in the Supreme Court of New York to determine who was entitled to the funds deposited with the New York

[25] Tyler v. Judges, 175 Mass. 71, 51 L. R. A. 433; Roller v. Holly, 176 U. S. 398.

commissioner of insurance. Before a decree was entered Parker was removed in New Jersey and Stockton appointed, by the Court of Chancery of New Jersey, as receiver in his stead.

Without further amendment of the pleadings the Supreme Court of New York later entered a decree that Reynolds and his associates recover $1,010,496 of Parker as receiver of the New Jersey Mutual Life Insurance Company; and Stockton having refused to make payment, the Court of Chancery of New Jersey was moved to order him to do so. This the court refused to do, because the decree for payment of this money in a suit to determine who was entitled to the funds on deposit with the New York commissioner of insurance was not responsive to the pleadings, was therefore void, and was entitled to no respect in New Jersey. The order so rendered was sustained by the Supreme Court of the United States, from whose opinion the following is quoted:

18. **Same subject—Opinion quoted.**—"Given a court of general jurisdiction in ejectment as well as in replevin, a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not, even in the courts of the same state. If not there, the constitutional provision quoted gives no greater force to the same record in another state.

"We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And without amendment of the pleadings, a judgment for the recovery of the possession of real estate, entered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matter controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not in fact put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the mat-

ters determined, the rule is universal that where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a state, as to all subsequent inquiries in the courts of the same state, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one state to judgments rendered in the courts of another state."[26]

19. **Same subject—Another case.**—The court then proceeded to quote with approval the language of the Court of Appeals of New Jersey in the leading case of Munday v. Vail,[27] in which a decree declaring a deed wholly void on a prayer by a judgment creditor that it should be decreed void as to him, was held void in so far as it exceeded the prayer, as follows: "A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is

[26] Reynolds v. Stockton, 140 U. S. 254, 11 S. C. R. 773.
[27] 34 N. J. L. 418.

only over these particular interests, which they choose to draw in question, that a power of judicial decision arises." And again: "A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated."

From these cases it will be seen that the test to determine whether the court had jurisdiction of the question is to read the prayer for relief and see whether it prays for the relief granted. In so far as that relief is prayed for, the pleadings give the court jurisdiction to decide it. It is no answer to say that there are no facts alleged which show or even tend to show that the party was entitled to such relief. It is enough that he has asked for it. If so the court is bound to decide whether he is entitled to it; and if in deciding this question the court falls into error it is error merely. But if the court steps outside of the pleadings and assumes to decide matters and grant relief not prayed for, merely because the party seems entitled to it, the judgment is void as to such excess.

20. **That procedure is jurisdictional.**—It is believed that the six essentials above discussed are all the elements of jurisdiction. But there remains one more topic to discuss. There are many decisions to the effect that when a certain procedure is prescribed to be pursued in an action either of common law or

statutory origin, obedience to all the requirements of such statute is essential to the validity of the judgment in such action. There is very little to be said in favor of this view; and it is believed that the great mass of decisions to this effect can be traced to two or three causes: (1) the failure of the attorneys and judges engaged in the case to appreciate the question and the effect of the decision; (2) the attempt of a court to save an unfortunate from a hard case, which often makes bad law; and (3) the blind following of prior cases produced in such instances as above referred to.

But let us see what can be and has been said in favor of this view. Assume that the legislature has provided a new remedy to attach or garnish effects of debtors and appropriate to payment of their debts, to sell land of infants for their support, to dispose of land of deceased persons to pay their debts, to take property for a street or other public use, to pay for a public ditch, or the like; and in doing this the legislature has provided suitable machinery by various steps to carry the plan into effect, a dozen or a thousand things are required to be done; it is said that the only authority for the proceeding is the statute, and if that is not followed there is no authority at all, the statute is imperative, mandatory, and must be obeyed.

For example, it is provided that property of the defendant may be attached if the plaintiff shall make affidavit of the amount of his claim, that it is due on contract, that the defendant is about to abscond, dispose of his property to defraud creditors, or the

like, and that plaintiff is apprehensive of losing his claim unless the property is attached. An attempt to follow the statute is made, the property is taken and sold, it is later discovered that by some slip some requirement of the statute was not obeyed; the debtor replevins his property from the purchaser, and the court holds the sale void because the requirements of the statute were not observed.

21. **Procedure not jurisdictional.**—The fallacy of the foregoing argument is plain and manifest. As to the statement that the law is imperative, and there is no authority to proceed without obeying the law, it might with equal truth be said that there is no authority for rendering judgment against one for more than he owes, or without proper proof of his indebtedness, or without pleadings showing a cause of action against him; but no one thinks a judgment would be void because the judge erred in receiving improper testimony, overruling a proper defense, sustaining a defective complaint, or holding the demand proved when he should rule that the evidence was insufficient. The erroneous judgment is binding unless and until reversed on appeal or the like. It is for the judge trying the case to say whether the procedure is sufficient or not, and if a defendant in whose favor a provision is made fails to insist on observance of it he waives his right. The judgment of the court in rendering judgment sustaining the proceeding includes of necessity an adjudication that the procedure is sufficient, and to permit argument of the question without vacating the judgment is unwarrantably disregarding the bar which the judg-

ment produces. So much for the logic of the case; but the considerations of public policy are much stronger. It is not once in a thousand times that the omission has in the slightest prejudiced the party carping at the judgment and seeking to avoid it collaterally. To enable him to avail himself of the technicality is an inducement to him not to object in the first suit if he knows of a departure, but to save the defect for future use to defeat the judgment after he has been beaten on the merits. If that rule is followed the legislature must be held to have defeated its own object of protecting all parties concerned and producing the best price at a forced sale; instead of providing numerous safeguards, to have laid numerous traps and snares to catch the unwary. Intending bidders are frightened away, there being so many chances that they may not get good title to one that they will; wherefore the property must be sacrificed instead of bringing the best price, and that when money is most needed. The public who have been told courts are places for jugglery, not for justice, and are inclined to believe it, see a demonstration of the statement in the disrespect of courts for each other's prior judgments.

CHAPTER II.

THE RECORD.

22. **Nature.**—The record is the official history of the proceedings in a cause, prepared by the court or some of its officials as a perpetual memorial of what was done, and in strictness it is said not to include all the papers but only the original writ, summons and other process to get the defendant into court, declaration or complaint of the plaintiff, answer or plea by the defendant, replication, rejoinder, rebutter, surrebutter, or other pleadings on either side to get to an issue, impaneling and verdict of the jury, the judgment of the court thereon, and executions to put such judgment into effect. But if it be desired to get other matters into the record for any purpose, such as to get the fact before another court for review, testimony taken and other matters may be incorporated into the record by the court, as by settling a bill of exceptions.

23. **Entry of the record.**—In theory of law the entry is to be made at once as the fact occurs so far as it pertains to what is done in open court, and that is why a recorder or clerk is to attend the court in all its sittings. But if any entry is not made when it should be, it is no less the right of the parties and the duty of the court to have the entry truly made so that the record may furnish a true and complete history. If the neglect is discovered, even years aft-

erwards, the court may and should cause the entry to be then made. For this purpose it is not essential that any notice should be given to any of the parties, though notice should properly be given, that the parties may show if they can to the satisfaction of the court any modifying facts. Notice is not jurisdictional to making the entry because it is the court making up its own memorial. Its attention may be called to the neglect by a party or a stranger, or by the judge's own discovery, whereupon the judge may order the entry made without further notice or ceremony.

24. **Same subject—Example.**—For example, fourteen years after judgment in a cause it was discovered by a stranger that no entry of that fact had been made on the record, whereupon the judge ordered entry to be made at once, which was done. When this record was offered in evidence in another case it was objected that the entry was made by the court without sufficient evidence and written memoranda on which to make it, that it was made at the suggestion of a stranger, that the party against whom it was offered was not notified of the proposed entry before it was made, and that the clerk had no power at so remote a day to make any entry at all. All these objections were overruled; and the court said: "There can be no doubt that it is competent for a court of record under its general inherent and necessary authority to correct the mistakes and supply the defects of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time, as well

after as during the term, *nunc pro tunc* (now for then). The length of time in this case, between granting the license and making up the record, does not take away the right or jurisdiction of the court. The authorities upon this point are numerous and conclusive. This was not a case of want of jurisdiction, in which the record cannot be amended, because, there being an omission to act, there is nothing to record; in such case, the defect is not in the record, but in the action of the court. It was further said in argument that there was not sufficient material from which to make up the record. But the court of common pleas, having the exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed. Such a record, when made up, is conclusive until altered or set aside by the same or some other court having jurisdiction; but it cannot be drawn in question collaterally when such record is used or relied upon in support of a title. It was further said that the extended record was invalid, because made without notice. But this was not a case for notice. Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case."[28] This power is not dependent on statute, and may be exercised in term time or vacation, by the same judge or his successor, and even after the death of the parties.

25. **Conclusiveness of the record.**—The record,

[28] Balch v. Shaw, 61 Mass. 282.

being made for the purpose of preserving the history of the matter, is more likely to be correct than the memory of casual bystanders or even parties to the case, and much less liable to prejudice and bias; wherefore in all other courts it is the only fit and appropriate evidence of what occurred. It can neither be added to nor contradicted in any proceeding in which it becomes material to inquire what happened in the case, and no other evidence is competent to prove the facts. Such is the general rule. But in a proceeding, civil or criminal, against the officer making the record, charging that he willfully or fraudulently made a false entry, other evidence of the true facts may be given; for otherwise it would be impossible to convict or recover damages for the wrongful act. Likewise, in a proceeding, in the court whose record it is, to have a false entry erased and a true entry made in its place, the court may receive any evidence outside of the record it desires, to refresh its recollection and enable it to make a true record. When an officer makes an entry as of fact which he can learn only by hearsay, as that the person on whom he served the process was president of the company, this fact is open to other proof.

The party prejudiced by the false record offered in evidence against him can easily get redress by going to the court whose record it is, having the false entry erased or corrected, and obtaining a new transcript. Not so if it is a judgment of a court of another country. It is the state's duty to protect its citizens. It never sends them to a foreign state or country for justice. When a foreign judgment, or

a judgment from another state, is offered in evidence, it is always competent to show by extrinsic evidence that the court assuming to render it had no jurisdiction, even in contradiction of express allegations of fact on such jurisdictional point contained in the record so offered in evidence. If the record states that the defendant was personally served, he may show by his own testimony that he was not notified at all. If the record states that he appeared and defended, he may show that he did not appear.[29]

[29] Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589.

CHAPTER III.

EFFECT OF A JUDGMENT AS A BAR.

26. **Why a bar.**—The purpose of suit is to establish the right and have redress for the wrong; and in order to accomplish this purpose it is necessary that when by due trial the right is established, and judgment rendered accordingly, the parties shall forever be concluded thereby to say the contrary. The judgment is a finality as to the cause of action sued on and the whole of it, as to every ground of recovery and every possible defense, whether such ground of recovery was urged or not, whether or not such defense was pleaded or urged, whether the plaintiff sought to recover the whole amount or not. This idea is elaborated in the following paragraphs:

27. **Amending and modifying judgments.**—It is a general rule of law that all judgments, decrees, or other orders of courts having terms and vacations are under the control of the court which pronounced them during the whole term at which they are pronounced; and that no matter how conclusive and final in form, they may be vacated, modified, or annulled by the court of its own motion, or on the motion of anyone. But it is a rule equally well established that after the term is ended all final judgments pass beyond the control of the court, unless steps are taken during such term to vacate, modify, or amend them, and such motion is carried over to the next

term as unfinished business. To this general rule certain exceptions have crept into practice; but the circumstances in which such relief will be given differ in the several states, and it is probable that the line is not very distinctly drawn in many states.

At the old common law relief might be had after the term in a great variety of cases by a new action; for example, attaint, if the jury had found a corrupt verdict; *audita querela* (hear the question), if a defense arose after judgment rendered; writ of error to correct some mistake of law appearing on the face of the record, etc.; but at the present time relief of this sort is given in most states on simple motion addressed to the discretion of the court pronouncing the judgment. To some extent this change is due to statute; to some extent to the more liberal attitude of the courts of today. But it is a matter of necessity that some limit be put beyond which the court shall not interfere to revise its judgments; else the uncertainty and insecurity of the judgment, due to the vacillating character of the court, might be more intolerable than no judgment at all. Therefore, courts are generally unable to vacate their judgments or modify them after the term at which they are rendered. It has been quite generally held that such inferior courts as justices of the peace have no power to vacate their judgments at all. As soon as such courts render their judgments they lose power to do anything further in the case except to supervise the enforcement of the judgment.

28. **Splitting the cause.**—If an injured party sues for part of his damage he can never recover for the

rest in another suit after judgment in the first action, whether that judgment was in his favor or not. For example, a man crossing a railway was negligently struck by a passing railway train, his horses killed, his wagon demolished, and himself seriously injured. He sued and had judgment for the injury to his horses and wagon, and later sued for the injury to his person. The defendant urged that there was but one cause of action, one wrong, and one injury, and that he had once had judgment thereon, wherefore he was barred from further recovery. The plaintiff did not deny the main contention, it was too fundamental to debate; but the plaintiff said that there were two causes of action, one for the injury to his property and one for the injury to his person. On this last point the courts are not agreed; but this particular court held that there was but one cause of action, and from this conclusion it followed of necessity that no further recovery could be had.[80]

29. **Splitting the grounds of recovery and defense.**—Parties cannot try their actions on the installment plan. All grounds of recovery not urged are as completely barred as if urged and denied. A receiver for an insolvent estate sued to set aside a deed by the insolvent to his son and a mortgage by the son to alleged creditors of the insolvent, urging that the deed was without consideration and the mortgage a fraudulent preference. Judgment was given for the defendants. Later the receiver brought another action, alleging that the son was a creditor of the father and the deed a fraudulent preference. The

[80] King v. Chicago, M. & St. P. Ry. Co., 80 Minn. 83, 82 N. W. 1113.

court pointed out that the primary right in both cases was the same, to have the land; and the defendant's primary duty was the same, to give it up. It is true the basis of the primary right in one case is different from that in the other, but that is a mere difference in the ground of recovery, not a different cause of action. If a ground of recovery or defense not urged were not barred, the same case might be retried as often as a new ground of recovery or defense could be invented.[31]

The United States prosecuted a suit to avoid a patent and failed. Later it instituted another suit to recover the same land on a different ground. The first suit was held to be a bar to the second. The court said: "Formerly it was sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this as in the former suit it seeks to establish its own title to the fee. It may be the law of Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi* (method of demonstration). * * * But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim; and *a fortiori* (with stronger reason), he cannot divide the grounds of recovery."[32] Likewise the defendant must make his whole defense when sued. If he has several defenses and brings

[31] Patterson v. Wold, 33 Fed. 791.

[32] United States v. California Land & O. Co., 192 U. S. 355, 24 S. C. R. 266.

forward all, all are concluded by judgment for plaintiff. If he has several and urges only part of them, the others are equally concluded by the judgment.

30. **Cross-claims.**—If the defendant has counterclaims constituting a cause or causes of action in his favor he may set them up in the plaintiff's action or bring an action of his own. The only result of his failure to set them up as counterclaims in the original suit is that usually the statute imposes the costs on him as a result of the expense imposed on the opposite party of prosecuting or defending two suits instead of one. But if counterclaims are set up, the same rule applies to them as to the plaintiff's cause of action; the judgment absolutely bars them. If allowed to any extent, the judgment is proof that nothing further is due. If the defendant only claims part of his single counterclaim, the rest is waived, and can never be recovered or set up as cross-demand or defense in any subsequent suit.

31. **Fraud.**—That the opposite party in the prior suit succeeded by means of fraud practiced on the court or defeated party is reason for vacating the judgment so procured; but till so vacated the judgment is as binding on him as if obtained by the most fair means. It is each party's business to see that his side of the case is properly presented to the court, and if the effect of the judgment could be avoided collaterally by allegation of fraud, such an allegation would be made in almost every case, and the beneficial effects of the law of bar by judgment would be destroyed.[33]

[33] Bleakley v. Barclay, 75 Kan. 462, 89 Pac. 906.

32. **Judgments not on the merits.**—If a suit is dismissed because the plaintiff fails to prosecute, or for some other reason not going to the merits of his demand, such judgment does not prevent him subsequently prosecuting a new suit for the same cause. For example, if the judgment went for the defendant because the plaintiff sued before the cause of action matured, sued in the wrong form of action, sued in the wrong court, failed to join proper parties plaintiff or defendant, or the like, such judgment will not prevent him prosecuting a new action after the cause of action matures, in the proper court and form of action, by and against the proper parties. But in this connection it is important to distinguish between a mere non-suit, and a retraxit. If the suit is dismissed merely from default of the plaintiff, he may sue again on proper terms, paying the costs of the former suit, or the like; but if he withdraws his claim, that amounts to an abandonment; and judgment entered thereon is on the merits and a complete bar to any further suit on the same cause.[34]

If the record of the former suit offered in evidence as a bar to a new action does not show the ground on which the suit proceeded, oral testimony may be introduced to show that it is no bar, because dismissed for one of the reasons above mentioned. For example, judgment for defendant in a former action for the same cause was pleaded in defense of an action for money; and the plaintiff was permitted over the defendant's objection to prove by parol that the judgment in the former case was rendered because

[34] United States v. Parker, 120 U. S. 89.

the action was prematurely brought and for that reason alone, though the only plea of record was a general denial. On error the Supreme Court held such proof competent.[35] To suit on a bond, judgment for defendant in an action on a coupon on the same bond was pleaded in estoppel. Plaintiff was permitted to show by parol that judgment in the first suit was for defendant because he relied on a presumption of bona fides from purchasing before maturity, whereas he now offered to prove it by positive testimony. It is believed this is an extreme case, but the court admitted the defense on this proof. (Cromwell v. County of Sac, 94 U. S. 351.)

[35] Waterhouse v. Levine, 182 Mass. 407, 65 N. E. 822.

CHAPTER IV.

JUDGMENTS AS ESTOPPELS.

33. **Distinguished from bar.**—The bar of a judgment extends only to conclude the parties from prosecuting any further action for the same cause, or interposing any defenses to a judgment which might have been interposed at the trial on which it was rendered. But the judgment is conclusive between the parties, not only as to the same cause but if brought in question in any subsequent action for any cause. It bars further action on the same cause, and it estops the parties from contending the contrary as to the facts determined, in any cause whatever. The judgment is a bar to every defense made or which might have been made.

It is an estoppel only as to the point actually litigated, certainly and necessarily determined. For example, if A sells B a horse, B giving two notes for $100 each, for the price, one maturing in six months, the other in a year; and when the first note matures A sues B on it and B defends that the horse was warranted to be sound but in fact was not, wherefore it was not worth the price, and plaintiff ought not to recover, judgment for the plaintiff on this note prevents the defendant ever urging any defense to that demand, whether he made such defense or not. But when the plaintiff subsequently sues on the other cause of action represented by the other note, the

defendant may make any defense except the one found against him in the first suit. He will not be permitted to urge that the horse was not sound, but he may plead that the plaintiff did not own it, wherefore there was no consideration for the promise, or that the plaintiff was guilty of fraud in procuring the sale, wherefore defendant repudiated the contract.

34. **Essentials of an estoppel.**—To create an estoppel by judgment it is essential: that the parties to the two actions be the same; that the point raised in the second action was actually litigated in the prior suit; that it was certainly and necessarily decided; that the two actions depend on the same law; and that the court that tried the first action might try the last. The few peculiar instances in which judgments bind strangers, and the rule that one who succeeds to a party is equally bound as the party would have been, will be considered later; but at present let us consider the several essentials above mentioned separately.

35. **Parties estopped.**—Ordinarily no person is bound by a judgment who was not a party to the suit. By party we do not mean one whose name appears in the title or record of the case. One not named may be a party, and one named may not be a party. If an assignee of a demand sues in the name of the assignor, he is bound by the judgment and the assignor is not bound. The reason is that the assignee only has the right to control the prosecution. That right is what makes one a party or not. In the great leading case of The Duchess of Kingston,[36] we find an

[36] Howell's State Trials No. 551, Smith's Leading Cases *424.

excellent statement and illustration of the rule. The Duchess of Kingston was indicted for bigamy, and she sought to estop the crown from asserting the existence of the first marriage by proof of a suit by her against the former alleged husband in the consistory court of the bishop of London, charging him with slandering her by alleging that they were married; in this suit he had appeared and affirmed his claim, and on the trial he was found guilty of slander and ordered to stop his accusation. This judgment was held not competent proof, and no estoppel, because the crown now prosecuting this suit was not a party to that action. The following quotation has become a classic:

Chief Justice DeGray, in giving the unanimous opinion of the judges, said: "What has been said at the bar is certainly true as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them."

36. **Estoppel extends only to points actually litigated.**—The reason why there is any conclusion of the parties at all beyond the cause of action actually disposed of in the prior case is, because it would be oppressive to a party to put him twice to the expense of establishing the same facts, and be unduly burdensome to the public (whose courts are run at great expense to enable citizens to settle their rights) to permit its time and funds to be consumed in a retrial of points already concluded by a final judgment between the same parties. But if the doctrine were carried beyond this, it would tend rather to contention than to quiet. It would make every trial a trap for the unwary, if every person suing or sued on any demand were bound at his peril to raise and litigate every possible question material to the case, at the peril of being estopped in every subsequent action on a different cause against the same party, though it might be impossible to foresee the bearing this fact might have on the future rights of the parties. It would be a harsh and oppressive rule which would make it necessary for one sued on a trifling claim to resist it and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material fact alleged and not denied and disproved, so as to prevent him showing the truth if another controversy should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than defend against it. The plaintiff cannot justly complain that the defendant has not seen fit to make defenses and

raise issues for the purpose of laying the ground or clearing the way for future litigation. A prior judgment between the same parties awarding separate maintenance for cause was pleaded as an estoppel to an action for divorce on the ground of adultery, the alleged adultery being committed before the trial of the previous action; but the court held there was no estoppel created thereby, the adultery not being urged in defense of the first action.[87] If a judgment for the plaintiff is rendered by default, it is as conclusive in the plaintiff's favor as to the cause of action sued on as if it had been bitterly contested; it is an absolute bar. But since no defense was made, there is no estoppel thereby as to any fact whatever. The original cause of action is concluded, but nothing else is.

37. **Estoppel only as to points certainly and necessarily decided.**—It is not enough that the point was actually litigated. It must appear also that the point was in fact decided, and was material to the judgment. An action was prosecuted on a declaration containing three counts, only one of which stated a cause of action, and that for malice. The case went to the jury on all three counts, and a general verdict was rendered for the plaintiff. On the judgment rendered thereon execution against the body of the defendant was issued, and he was imprisoned. On judgments for malicious injuries such executions were allowed by law. The defendant moved to be discharged, and offered to show absence of malice. The plaintiff objected to such proofs, contending that

[87] Watts v. Watts, 160 Mass. 464, 36 N. E. 479.

the judgment estopped the defendant to deny malice. The court held otherwise. If the defendant had moved in arrest of judgment on the ground that no cause of action was stated in either of the first two counts, and that it did not appear on which the jury based their verdict, the motion would have been denied, based on a presumption indulged in favor of the plaintiff that the verdict must have been on the good count; but for the purpose of estoppel no such presumption can be indulged.[38]

38. **Two actions depending on different law.**—A judgment on verdict found on a preponderance of proof ought not to be an estoppel in an action requiring proof beyond a reasonable doubt. A judgment based on wager of law ought not to estop in a case in which law could not be waged. To permit this would in effect be permitting wager of law in the other case also. This point is well expounded in the opinion in the case of The Duchess of Kingston,[39] before mentioned: "If a man should be indicted for taking a woman by force and marrying her, or for marrying a child without her father's consent, or for a rape where the defense is that the woman is his wife—in all these cases the temporal courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous, and whether it was a marriage within the statute, a marriage without consent. * * * And if the rule of evidence must be, as it is often declared to be, reciprocal, and

[38] Kitson v. Farwell, 132 Ill. 327, 23 N. E. 1024.

[39] Howell's State Trials No. 551; Smith's Leading Cases *424.

that in all cases in which sentences favorable to the prisoner are to be admitted as conclusive evidence for him, the sentences, if unfavorable to the prisoner, are in like manner conclusive evidence against him; in what situation must the prisoner be whose life, or liberty, or property, or fame, rests on the judgments of courts which have no jurisdiction over them in the predicament in which they stand? And in what situation are the judges of the common law, who must condemn on the word of an ecclesiastical judge, without exercising any judgment of their own? * * * If, therefore, such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for felony committed after, the opinion of a judge, incompetent for the purpose, resulting (for aught that appears) from incompetent proofs (as suppose the suppletory oath), will direct or rule a jury and a court of competent jurisdiction without confronting any witnesses, or hearing any proofs. * * * The difficulty will not be removed by presuming that every court determines rightly; * * * if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country."

39. **If the court that tried the first case could not try the last one.**—What is said in the preceding section indicates that there is no estoppel by a judgment unless the court that rendered it could have tried the case in which such judgment is set up as an estoppel. This is a rule of necessity, based on

the highest considerations. If it were not so, a judgment of an inferior court might be invoked to control the determination of a case in a superior court in a matter which the inferior court could by no means try. It would in effect determine the matter by the judgment of a court having no jurisdiction. Every sovereign state has the right to determine who shall own the land within its borders, and for the purpose of determining this judicially the exclusive jurisdiction is vested in the courts of the state; but if these courts were bound to enter up the judgments of courts of foreign states or countries who may have obtained jurisdiction of the parties and rendered judgments binding on them in personam, then the effective jurisdiction is taken from these courts and vested in the courts of the foreign states. Such is not the law.

Take another illustration. A doctor was sued for damages for malpractice. He immediately sued in justice court for his services, and obtained judgment. This judgment he pleaded as an estoppel to the action for damages. The court surmised that the suit for services was prosecuted merely for the purpose of obtaining an estoppel to plead in the higher court; but, waiving this, the court considered the practical aspect of the matter: if the person injured had urged his cause as a counterclaim in the justice court, the amount he could recover in any event would have been limited to $100, the limit of the justice's jurisdiction, and an amount wholly inadequate.[40]

[40] Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10, disapproving the decision of the court of appeals of New York to the contrary in Dunham v. Bower, 77 N. Y. 76, 33 Am. Rep. 570.

40. **Judgments bar and estop privies.**—One is privy to a judgment when he derives his right in the matter through a party, either directly or indirectly. If the judgment did not bind one obtaining his rights through a party, the effect of all judgments, both as to bar and estoppel, could be avoided by merely assigning the right to another, who would claim free from the bar or estoppel. In an early case, one sued for trespass to his land, and the defendant said in defense that the plaintiff was his villein, wherefore he had no right to sue; on the trial plaintiff was found free, and given judgment. Later title to the manor passed to another, who also committed trespass, and the plaintiff sued him, and he defended that the plaintiff was his villein, to which plaintiff pleaded the former judgment in estoppel. The defendant sought to avoid the effect of the estoppel by showing that he was not a party to the prior action; but he was held bound, because, as was said by Paston, J., otherwise each who is in such case after this that his villein is found free may make a feoffment, and the feoffee would not be estopped to claim him that was found free as his villein.[41]

One distinction between privies to the bar and privies to the estoppel of judgments is to be carefully observed. Anyone who acquires rights in the subject matter of the action after suit commenced and process served on his assignor is privy to and barred by the judgment; but one who acquires other causes of action from a party pending suit is not estopped by the judgment afterwards rendered in

[41] John Broke's Case, 9 Hen. 6, pl. 67.

the prior action for a different cause. The reasons for this distinction are imperative. If one acquiring rights in the same cause of action after suit brought were not bound by the judgment, it would be impossible ever to bring the matter to a close if the defendant desired to avoid such result, for he could assign as soon as sued. On the other hand, business would be greatly embarrassed if all assignees were at the peril of being estopped as to any point which their assignor and any other person might afterwards choose to litigate in any action pending at the time of the transfer. As to the cause of action sued on, it may be seen in advance that all grounds of recovery and defense will be concluded by the judgment; but no man can tell what points they may elect to try. All are estopped who buy after judgment; all are barred who buy after suit begun.

41. **Judgments binding strangers.**—While it is generally true that strangers to an action are neither bound nor benefited by any determination therein, there are certain well-established exceptions, based on reason and public policy. Courts are required by law to keep records of their doings, as a perpetual memorial thereof; and whenever it afterwards becomes material to inquire what transpired at any session of the court, whether the question arises between the parties or between strangers, it is reason that the court's official records should be proof of such facts; it is more probable that the records will show the truth than that the casual memory of bystanders should be correct. Again, whenever a fact may be established by proof of general reputation,

such as custom, prescription, pedigree, or the like, the record of a judgment or decree finding such fact is prima facie evidence of that fact even against strangers to that suit. The solemn adjudication of a court upon testimony is justly regarded as stronger proof of the fact than mere evidence of general reputation. Again, debtors do not lose their rights to do business with others by mere reason of contracting a debt with one. A judgment obtained against a debtor by one creditor is conclusive against all other creditors, though strangers to the suit, unless obtained by collusion: (1) because it is conclusive between the parties to the case, who have the exclusive right to try it; (2) because the claims of other creditors to the property are through the debtor, and subject to all prior liens and conveyances in good faith. Neither a creditor nor a stranger can interfere in a bona fide litigation of the debtor, nor retry his cause for him, nor question the effect of the judgment as a claim upon his estate. Where, however, fraud is established, the creditor does not claim through the debtor but adversely to him, and by title paramount, which overreaches and annuls the fraudulent conveyance or judgment, by which the debtor himself would be estopped.[42]

It is a matter of public necessity that someone should always have power to deal with all property. If future estates in property are settled on persons yet unborn, and for some reason it becomes necessary to deal with the property, the court of chancery, on suggestion by any friend of the court, especially by

[42] Pabst Brewing Co. v. Jensen, 68 Minn. 293, 71 N. W. 384.

one interested in the persons unborn or in the property, and on bill filed bringing all known living persons having interests in the property into court, will appoint someone to represent the unborn and make such decree as is necessary to preserve the property, make it productive, or otherwise serve the purposes of the settlor; and when those to whom such future interest will belong are born, they will be held bound by such decree.[43]

42. **Same subject—Judgments in rem.**—It is sometimes contended that the rules heretofore discussed do not apply to judgments in rem, and that both parties and strangers are concluded by such decrees. This is a mistake. There is no estoppel by a judgment in rem against anyone not a party more than in the case of a judgment in personam; and the bar of the judgment differs from a judgment in personam only as the judgment in its purpose and nature so differs. In an action to set aside a mortgage executed by plaintiff's testator defendant invoked the decree of the probate court admitting the will to probate as an adjudication that the deceased was not insane, the ground on which it was sought to have the mortgage vacated; and he argued that since the action of the court in probating the will was in rem all persons, whether parties to the proceeding or not, are bound and benefited by the decree.

This defense and evidence were excluded, and in sustaining this ruling, Holmes, J., speaking for the court, said: "A judgment in rem is an act of the sovereign power; and, as such, its effect cannot be

[43] Mayall v. Mayall, 63 Minn. 511, 65 N. W. 942, and cases cited.

disputed, at least within the jurisdiction. If a competent court declares a vessel forfeited, or orders it sold free from all claims, or divorces a couple, or establishes a will under a statute, * * * a paramount title is passed, the couple is divorced, the will is established, as against all the world, whether parties or not, because the sovereign has said that it shall be so. Also the same is true when a judgment is that A recover a debt from B, and no one within the jurisdiction can oppose it. But it does not follow in the former case any more than in the latter, nor is it true, that the judgment, because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded. On the contrary, those judgments, such as sentences of prize courts, to which the greatest effect has been given in collateral proceedings, are said to be conclusive evidence of the facts upon which they proceed only against parties who were entitled to be heard before they are rendered."[44]

[44] Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265.

PART II

EXECUTIONS

CHAPTER V.

NATURE AND EFFECT OF EXECUTIONS.

43. **In general.**—The execution is the life of the law. Without the power to execute, the power to adjudge is vain. Therefore the power to adjudge is held to imply the power to enforce. Every court having power to adjudge is held to have the implied power to issue execution on its judgments to put them into effect. There are, indeed, some judgments that need no execution, such as those which declare the existing state of things to be the proper state; for example, judgment in favor of the defendant of no cause of action, or quieting title to land in the complainant who was already in possession. But ordinarily judgments have to be put into effect by execution. An execution is a process issued by the court rendering a judgment, addressed to the sheriff or other proper ministerial officer of the jurisdiction where the court sits, reciting the names of the parties, the nature of the action and judgment, and ordering such officer to put the judgment into effect, signed by the clerk of the court, and authenticated by its seal.

44. **Kinds of execution.**—The execution ought to be appropriate to the judgment to be enforced. The

judgment may decree that the plaintiff is entitled to keep what he has or is not entitled to receive what he asks, in which no execution is necessary, or that the defendant do or refrain from doing some act, or that the plaintiff recover a specific chattel, specific land, or a sum in money, or any combination of these. Therefore, the execution should be that the sheriff put the plaintiff in possession, that the sheriff make the sum awarded from the goods and land of the defendant, or that he take and imprison the defendant till he do the thing commanded of him, or the like. For the purposes which have been enumerated the most common forms of execution are the fieri facias and the capias.

At the common law a fieri facias was a writ issuing from the court that rendered the judgment, directed to the sheriff of the county and commanding him to seize and sell sufficient of the goods and chattels of the defendant to make the amount of the judgment and costs, and to have the money in court by a day named. By statute the sheriff is also authorized under such a writ to sell land belonging to the defendant.

45. **Same subject—Capias.**—The capias may be used either as process, capias ad respondendum, or as execution, capias ad satisfaciendum; and as execution it commands the sheriff to take the defendant and hold him in safe and secure custody till he shall satisfy the judgment. At the oldest common law this execution could only be used to enforce judgments recovered for wrongs accomplished by force or for dues to the king; but by degrees it was extended

till it was commonly used in all actions. The oppression of poor debtors by greedy creditors finally induced statutes and constitutional provisions abolishing the use of this writ for the recovery of simple honest debts; but it is still available to enforce payment of judgments recovered for money due for torts, such as assault and battery, slander, and malicious injuries, or for contract obligations incurred by breach of trust, misconduct in office, or fraud. Neither law nor public policy requires that the crook should be relieved from imprisonment for his wrong without satisfaction of the party injured. If the judgment is one for which such a writ is appropriate, the plaintiff may take it as a matter of course, without any special order of the court awarding it to him; but prudence commands that the judgment creditor get a special order for it instead of taking chances of the court afterward holding him liable for false imprisonment, on the ground that his judgment was not one on which such an execution should issue.[45]

46. **Issuing the writ.**—Execution cannot be issued till the judgment is rendered, but it has often been held that execution issued after judgment pronounced and before making the entry of record is good. In other courts it has been said that there is no judgment till it is written out; and therefore the only safe way is to have the judgment entered of record before taking execution. It has also been held that till the writ is in the hands of the sheriff it is not issued; wherefore taking the writ from the clerk duly signed and sealed and carrying it to a

[45] Hormann v. Sherin, 8 S. Dak. 36, 65 N. W. 434, 59 Am. St. 744.

remote place to be executed is not a violation of an order staying execution, the writ not being delivered to the sheriff till the time has expired.[46] On the other hand, execution issued after the year and a day allowed at common law, or after the judgment becomes dormant under the statute, is not void. Sale under it passes as good title as if issued in time. The defendant may prevent the sale by having the writ quashed, but no one else can complain.[47] However, there are statutes in most if not all of the states providing that after a certain time all right under a judgment shall be barred, and if no execution is taken within that time the sale would be void.

47. **Same subject—Death.**—The death of the defendant prevented execution at the common law; because, by the death, the property belonged to other persons, the goods to the representative, the land to the heir; but the execution was a lien from the day of its date, and death of the defendant after that time did not prevent a levy on the property; and the effect of the restriction was evaded by dating the execution back to the first day of the last preceding term of court, so as to antedate the death of the defendant.[48] This practice is no longer permitted, for the statutes now provide that the execution shall be a lien only from the time the sheriff receives it, which time he shall indorse on the back of it, or that it shall be a lien only from actual levy. At the present time, therefore, it is generally necessary to

[46] Peterson v. Wayne Circuit Judge, 108 Mich. 608, 66 N. W. 487.
[47] Mariner v. Coon, 16 Wis. 465.
[48] Parsons v. Gill, 1 L. Raym. 695 (Eng.).

prove the judgment as a claim against the estate and take payment along with other creditors in the probate court.

48. **Same subject—Who may issue.**—Only the court that rendered the judgment could issue execution to enforce it at the common law, and that is still so where not changed by statute. Power to another court to issue execution is not to be implied or understood from statutes providing that the judgment shall become a lien on land by filing a transcript of it in another court, nor from the provision that on filing such transcript garnishment or other proceedings may be taken on the judgment in such other court. Such statutes authorize nothing beyond what their terms specify. But where the statute does expressly provide that on filing such transcript, or the like, the judgment may be enforced by execution or other process issuing from the court in which the transcript is filed, the filing of the transcript terminates the power of the court that rendered the judgment to do any further act to enforce it, and any execution or garnishment from it after the transcript is filed in the other court is void.[49]

49. **Same subject—Form.**—The statutes provide various requirements as to the form of the executions and other processes issued by courts—that they shall be addressed to the sheriff or other officer who is to execute them, be entitled in the court and cause, run "In the Name of the People of the State," be attested in the name of the judge of the court, "Witness the Hon. John Coon, Circuit Judge," bear the

[49] Rahm v. Soper, 28 Kan. 529.

seal of the court, be signed by the clerk, and the like. It is manifest that departures from these requirements are in practice various; and there is great confusion among the decisions as to whether the departure renders the process and sale under it void, or is mere ground for having the writ quashed on application before sale, or may be cured by amendment on such application. The only safe rule is to follow the statute to the letter, and if it has been departed from, ascertain from the decisions of the particular state to what extent such a departure affects the proceedings.

50. **Controlling execution of the writ.**—Every court from the highest to the lowest possesses power in the absence of statute to control the officer in his acts in executing its processes. This is a matter of necessity to prevent injustice. Execution was issued and put in the hands of the sheriff to collect. Later the judge, on motion of the defendant, without notice to the plaintiff or his attorney, ordered the sheriff to stay action till the first day of the next term of court. By that time all the property of the defendant had passed beyond the reach of execution. The creditor sued the sheriff to recover the amount of his judgment lost by the failure to execute; and claimed that the judge had no power to stop the writ without notice to the creditor, or if he had the sheriff was not protected by obeying the stay order without notifying the creditor. But the court held that it was the creditor's duty to take notice of what was done on his writ; and notwithstanding it was unwise, and bad practice, for the judge to stay the writ without

giving the opposite party a chance to be heard, still the order made without such notice was valid, and the sheriff was bound to obey it, under the pains and penalties of amercement, being liable individually and on his bond to the persons injured by his disobedience. The power to command includes the power to countermand.[50] It exists in all courts by necessary implication without statute.

Subject to the control of the court, the sheriff is bound to obey the orders of the judgment creditor as to what he does under the writ, so long as such orders are lawful. The creditor may specify what shall be taken, provided it is not exempt, fix the time and place of sale, so far as choice is left by the statute and the order of the court, or countermand the sale entirely if he desires to compromise with the debtor, and the sheriff is bound to obey such orders. He cannot proceed merely because he has incurred costs and fees which the creditor refuses to pay.[51] If the judgment has been sold, the purchaser and not the original owner has the right to control, and the officer refuses to obey the purchaser at his peril, unless he expressly bases his refusal on lack of proof of the right of the purchaser to control.[52]

51. **Who may execute the writ.**—The writ should be executed by a duly qualified officer, sheriff, deputy, constable, marshal, or a specially appointed officer, chosen by the court for the purpose, pursuant to the statute. No one can execute an execution who is

[50] Commonwealth v. Magee, 8 Pa. St. 240.
[51] Morgan v. People, 59 Ill. 58.
[52] Steele v. Thompson, 62 Ala. 323.

interested in the judgment. A sheriff should not execute a judgment in favor of his deputy nor the deputy in favor of the sheriff. When several writs in favor of different creditors are put out successively, all the writs should be given to the officer who makes the first levy; for no officer can take the property from the possession of any other officer. Moreover, the same officer cannot at the same time hold property under levy on writs from different courts; for he is the mere hand of the court, and when he has seized the property it is in the possession of the court whose officer he is; to surrender it to the possession of another court is a violation of the duty to the court having the first levy. That court cannot be thus deprived of its jurisdiction. No other court can acquire any rights by taking the property. But the sheriff and all his deputies are but one officer; and after a levy by the sheriff, a writ in favor of another creditor, but issuing from the same court, may, with the sheriff's consent, be levied on the same property by one of his deputies, and held for him; or after levy by the deputy, another writ may be levied by the sheriff. Probably one deputy would not be permitted to levy on property in the hands of another without the other's consent. The sheriff, having made a levy and left the property in the hands of clerks to inventory, directed a junior writ to be given to his deputy, who levied it; later the sheriff received a third writ and indorsed a levy under it without again going to the property, and this was held to be a good levy subject to the prior levies. Nothing would be accomplished by the sheriff returning and

putting his hand on the property, it being already in his possession by his clerk.[53]

52. **Sheriff's right to indemnity.**—To a limited extent the sheriff is protected by the writ he holds. If the court makes an order within its jurisdiction, though erroneous and unwarranted, it is the duty of the sheriff to execute the order, not set himself up as critic of the court to revise and pass on its decisions. He is not even required to inspect the record to see whether there is a basis for such a writ. He acts on what he has in his hands. But if it is void on its face, it is no protection to the sheriff in obeying it; and what makes the writ void is often matter for debate with the most learned; yet the sheriff is bound at his peril correctly to forecast what will be the decision of the supreme court on the question. From this it will be seen that the sheriff's position is not an enviable one; yet the courts have refused to change the rule while there are plenty of candidates willing to take the office. As a protection against this peril, the sheriff has a right to demand of the creditor a bond of indemnity whenever there is any doubt as to the right in the matter, and to refuse to act till the bond is given. But if the sheriff takes his chances and the property levied is exempt or belongs to someone other than the debtor, and the sheriff is compelled to respond in damages for the wrongful taking, he has no recourse against the creditor unless the creditor explicitly directed that thing to be taken.[54] If several writs are given to the

[53] Heye & Co. v. Moody & Co., 67 Tex. 615, 4 S. W. 242.
[54] Nelson v. Cook, 17 Ill. 443.

sheriff, he demands indemnity of all, and part only give it, and he proceeds to levy and sell and pay the money to those who indemnify, the failure to indemnify is a defense to the sheriff against the creditor whose writ he first received, for failing to pay that creditor any of the proceeds.[55]

53. **Sheriff's right to break in.**—The law protects the person of the debtor and his residence against violation by the officer having mere civil process. The sheriff cannot search the debtor's pockets on his person for money or goods to make the amount of the execution. If the sheriff says to the debtor: "What time is it? Say, that is a fine watch; let me see it. Oh, by the way, I have an execution here against you, and I will keep this watch and sell it to satisfy the execution," this is such a fraud on the debtor's personal security as will avoid the levy and sale.

The sheriff cannot break into the debtor's house to make a levy on his goods, or even to arrest him on civil execution; but if he finds the house open and gets in peaceably he may stay and make the execution, and even break inner doors for that purpose if necessary. A sheriff's deputy with execution went to the house of the debtor, found it open, entered, and was proceeding to levy, when the debtor imprisoned him in a room of the house, whereon the sheriff came with assistants, broke open the house to release his deputy, and while in levied the execution; and such levy was held lawful.[56] Another sheriff with execu-

[55] Cudahy v. Rhinehart, 133 N. Y. 248, 30 N. E. 1004.
[56] White v. Whiteshire, Palmer 52 (Eng.).

tion to arrest a debtor found the debtor in his house sitting by an open window, and reaching through the window touched the debtor on the arm to inform him that he was under arrest, whereon the debtor shut the window and barred the door, but the sheriff was justified in breaking in to make the arrest. With buildings other than the residence the rule is different; the sheriff may break into them to levy, if they are not opened to him on demand, and if there is no one present on whom demand can be made, or who could let him in, he may break in without demand. And what the sheriff may do, any of his deputies or a special deputy may do for that purpose.[57] The protection which the law gives the debtor in his house is for his benefit only. If he secretes the goods of another there, or makes asylum to protect another from arrest, the sheriff may lawfully break in to make the arrest.[58]

54. **When levy, sale, and return may be made.**— The prudent sheriff will act at once on receipt of the writ to search for property or person on which to levy it; and the writ regularly states that he shall make the amount of the execution and have the writ with his doings thereon in court at a day named, called the return day. Ordinarily he is not liable for neglect in the absence of special facts urging him to promptness if he acts within a reasonable time, even in some cases including all the time up to the return day. But if he makes no levy before the return day he becomes liable to the creditor to the

[57] Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.
[58] Semayne's Case, 5 Coke 91 (Eng.).

amount of the execution unless he proves that it was impossible to make it; the burden is on him to show the fact. If he neglects to make levy before the return day the writ is dead, and all he can do is to return it; if he has made only one levy before the return day he cannot make any levy after the return day. He may make as many levies as may be necessary before the return day to make enough to satisfy the writ; and if he has levied before the return day and has not sold, for want of time, lack of buyers, or other cause, he may and should make sale after the return day, first making due return on or before that day to protect himself from liability to the creditor for neglect. He may and should proceed to sell even after the return of his writ, and he needs no further authority to enable him to do so. But if he neglects, the creditor may further urge him by procuring from the court an order of *venditioni exponas* (you are ordered to put it up for sale), or the like.[59] If the sheriff has neglected to make return as he should, his return later is nevertheless valid, and no one but the creditor can complain of his remissness and neglect.[60]

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[59] Acton & Woodnutt v. Knowles, 14 Ohio St. 18.
[60] Smith v. Osgood, 46 N. H. 178.

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LAW OF EXTRAORDINARY REMEDIES

BY

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PART I

THE REMEDIES IN GENERAL

CHAPTER I.

DEFINITIONS, ANALOGIES AND HISTORY.

1. **The purpose of the remedies.**—The important extraordinary legal remedies at common law are mandamus, prohibition, certiorari, quo warranto, and habeas corpus. Mandamus is a writ which is issued to a court, a tribunal, a corporation, or an officer, commanding the immediate performance of an official duty; as, for instance, that a water company shall supply water to the petitioner, upon the same terms as those under which the company supplies it to others.[1] Prohibition is a writ which is issued to a court, or other judicial tribunal, forbidding it to go on in some matter, which is beyond its jurisdic-

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[1] People v. N. Y. Sub. W. Co., 56 N. Y. S. 364.

tion; as, for instance, that a coroner shall not hold an inquest as to the origin of a fire. Certiorari is a writ which is issued to a court, or other judicial tribunal, which does not proceed according to the common law, requiring it to certify and send up the record in a specified cause, so that its errors may be corrected; as, for instance, that the order of a city council, authorizing a highway to be laid out fifty feet wide, when it had power to lay it out only forty feet wide, shall be declared illegal. Quo warranto is an information against a corporation, or officer, to inquire by what warrant a public office, or franchise, is held; and to correct the usurpation, wrong use, or want of use, of such office, or franchise; as, for instance, to test the title of one who is acting as mayor of a city. Habeas corpus is a writ which is issued to a person, who detains another person in custody, commanding the former to have the body of the latter before the court, at a specified time and place; as, for instance, to test the validity of the arrest on civil process of a witness before a committee of the legislature.

2. **Not used in equity.**—Although there are traces of a practice, in the early English cases, to issue some of these writs in equity, now, in Great Britain, and in nearly all the United States, they are issued only at common law; and it is held by the Supreme Court of the United States[2] that to treat a petition in equity as a petition for the writ of mandamus "would ignore the well established principle of the federal courts that the line between the equitable

[2] Heine v. Levee Commissioners, 19 Wall. 655 (U. S.).

and common law jurisdictions must be maintained, and that a suit must be of the one character or the other, and be prosecuted by pleadings and processes belonging to each class of jurisdiction."

3. **Equitable analogies—Clean hands.**—Nevertheless, two important equitable principles apply to these extraordinary remedies, although they are not applicable to ordinary remedies at common law. For instance, the petitioner for an extraordinary remedy must come into court with clean hands. When, therefore, a telephone company refused service to a bawdy house, the court dismisses a petition for mandamus to compel the company to furnish the service, since to allow it would assist a criminal act. In Board of Supervisors v. Magoon,[3] the court dismisses Magoon's petition for certiorari to the supervisors, who had altered a road upon his land, although the action of the supervisors was illegal, because he had urged all their acts, and never claimed them to be illegal until they made a decision against him. In Whateley v. Franklin,[4] the court dismisses a petition for prohibition against the commissioners who had made repairs upon a town road, upon the representation by the town of Whateley that it was a county road or public highway, since "the effect of quashing the proceedings would leave Whateley in the full enjoyment of all the repairs and yet discharge them from paying for these expenditures."

4. **Same subject—Laches.**—The petitioner also must come into court promptly, although laches is

[3] 109 Ill. 142.
[4] 1 Metc. 336 (Mass.).

not an absolute bar, but is addressed to the discretion of the court; and the writs will be awarded or refused as the circumstances of each case may require. In Hill v. Mayor of Boston,[5] as to mandamus to the mayor to recognize the petitioner as the messenger of the printing department and to place his name upon the pay roll of the city as such messenger, the court says: "No precise definition can be formulated as to what is sufficient to constitute want of diligence, but at law, upon a petition for mandamus, as well as upon a bill for equitable relief, this question must depend upon the circumstances of each particular case." It is held in Illinois that laches is not a bar, if the petition be prior to the time which is fixed by the Statute of Limitations in similar circumstances. But, usually, if the neglect of the petitioner to assert his rights is an injury to others, as when the neglect has induced others to expend labor or money, it is within the discretion of the court to deny the writ, although the delay has been for a period less than that fixed by the Statute of Limitations in similar circumstances. Since a quo warranto, when filed by the attorney-general, is the act of the crown in Great Britain, and of the state in this country, laches on his part is no bar, in conformity with the maxim: *Nullum tempus occurrit regi* (No time runs against the king). In Pennsylvania, Indiana, Missouri, and Minnesota, however, there is no difference in this respect between the attorney-general and a private petitioner; and in Illinois, the court distinguishes between those cases

[5] 193 Mass. 569.

where the object is to enforce a private right and those to enforce a public right. Acquiescence in the acts complained of may be a bar, even against the attorney-general.

5. **Origin of mandamus.**—Mandamus originally was an order, or mandate, of the king; and it was his exclusive prerogative, directing obedience to the law, not necessarily as it had existed, but as the mandate itself then declared it to be. In other words, it was the command of an autocrat, whose will, when so expressed, became the law, from which there was no appeal. By the time of Edward II, however, it had become a judicial writ; but now it confers no new authority, and lies only to compel a man to do that which it is his duty to do without it.[6]

6. **Origin of prohibition.**—Prohibition grew out of the number and the variety of the early English courts, with no strict lines of jurisdiction, so that often there was a scramble on the part of the judges to obtain control over controversies. It was even a maxim that it was "the duty of a good judge to enlarge his jurisdiction"; and a powerful motive was an increase, by this means, of judicial fees, so that in some cases men who had no judicial authority at all would usurp judicial power and set up a court. Since it was essential to the power of the king to keep these courts to their appropriate duties, and to rule out usurpations, there arose, as matter of necessity, the writ of prohibition, whereby any man exercising judicial power could be compelled to show his authority. It was such a writ which, in 1340,

[6] Taxing Dist. v. Logue, 129 U. S. 493.

brought before the king's justices the greatest subject of the realm, the Archbishop of Canterbury, who persisted in holding in an ecclesiastical court a man to be tried for slander, who, under the common law, was entitled to be tried by a jury in a common law court. The writ of prohibition was the strong right arm of the government; and without it England might have been an aggregate of counties, instead of a powerful and consolidated nation. With it, the feudal lords could not maintain against the king their local courts and tribunals. The writ now restrains not only inferior courts, but other tribunals and officials charged with a duty only in part judicial, or not strongly marked with a judicial character.

7. **Origin of certiorari.**—The Court of King's Bench, which was divided into a crown side and a plea side, took cognizance, on the crown side, of all criminal causes; and all indictments might be removed into this court by certiorari, to consider the validity of the indictments: where insufficient trial would be had in the court below; in order to plead the king's pardon; or to issue process of outlawry against the offender in those counties where the process of the court below would not reach him. The scope of the writ then was limited at common law to remove criminal causes from inferior tribunals to the Court of King's Bench.[7] Subsequently its operation was changed in England by several acts of Parliament, and in the United States by legislation in most of the states, so that now it rarely is used in a criminal cause; and in civil causes its scope has

[7] Commonwealth v. Balph, 111 Pa. St. 365.

been enlarged, so that, whenever a new tribunal, unknown to the common law, is created by the legislature, if the law provides no appeal, certiorari is the appropriate remedy to correct its errors.[8]

8. **Origin of quo warranto.**—The earliest use of a writ of quo warranto upon record, in the ninth year of Richard I, A. D. 1198, is against the incumbent of a church. It was employed frequently by Edward I to strengthen the crown against the barons.[9] The precise time when the writ fell into disuse, and its place was taken by an information, in the nature of a quo warranto, is not known.[10] Blackstone says: "The judgment on a writ of quo warranto, being a writ of right, is final, even against the crown. Which, together with the length of its process, occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by information filed in the Court of King's Bench, by the attorney-general, in the nature of a writ of quo warranto, wherein the process is speedier, and the judgment not quite so decisive." Whatever the causes which led to the substitution of the information for the writ, it is now the usual process.

The writ was a civil proceeding. The information was a criminal proceeding, in which the usurpation of the office or franchise was charged as a criminal offense, and the offender was liable to a fine and imprisonment, in addition to the loss of the office or franchise. But the criminal character of the infor-

[8] Stone v. New York, 25 Wend. 157 (N. Y.).
[9] People v. B. & R. Turnpike Co., 23 Wend. 222 (N. Y.).
[10] State v. W. W. Ry. Co., 34 Wis. 197.

mation disappeared in England long ago in everything except in form, the fine being nominal only; and such always has been its character in most of the United States. But in Illinois[11] the same certainty and technical precision are required in a quo warranto information as in an indictment for crime. In Idaho also the criminal features are emphasized. In Tennessee neither the writ nor the information has been adopted, the remedy for the usurpation of an office or franchise being in equity. In New York the writ and information are abolished by the code of procedure, and relief is obtained by a civil action; but it is the form only of the proceeding which has been abolished, both the jurisdiction of the courts and the substance of the remedy remaining unchanged.

In most states the jurisdiction is fixed by constitutional provisions, prescribing the courts, usually the supreme courts, empowered to grant the relief; and it is held that the clause of the Constitution conferring the power to grant writs of quo warranto means the quo warranto information, and that to this reference must be had, in determining the powers of the court, rather than to the writ of quo warranto. It also is held that it is not necessary that the legislature should prescribe any particular mode of procedure, and that, in the absence of any such mode, the court will proceed in conformity with common law usages.

9. **Origin of habeas corpus.**—The right to freedom from restraint, without regular process, had existed always at common law, and traces of the

[11] Donnelly v. People, 11 Ill. 552.

existence of this writ are found in the Year Book, 48 Edward III, 22; and it was affirmed by Magna Charta. Nevertheless, arbitrary imprisonment was practiced both by kings and courts. Those by the privy council and crown officers, under Elizabeth, gave rise, in 1591, to an impressive address from the common law judges to Chancellor Hatton and Lord Burleigh; but in 1627, when certain knights were imprisoned by the king, for not yielding to a forced loan, the Court of King's Bench refused to bail them upon habeas corpus, though no cause, other than the king's command, was returned. After a long interval, there came the Petition of Right, a parliamentary declaration of the liberties of the people, assented to by Charles I, in the beginning of his reign. This was followed by more ample concessions from that king, and by the habeas corpus act under Charles II.

The colonists in America regarded the writ as one of their dearest birthrights, and it was resorted to frequently. The denial of it in Massachusetts, by Judge Dudley, in 1689, to Rev. John Wise, imprisoned for resisting the collection of a tax, was made the subject of a civil action against the judge, and the act was denounced in a pamphlet, published in 1689, on the authority of "the gentlemen, merchants, and inhabitants of Boston and the country adjacent." In New York, in 1707, the writ released the Presbyterian ministers, Makemie and Hampton, from an illegal warrant, issued by Governor Cornbury, for preaching the gospel without license. In New Jersey, in 1710, the assembly denounced one of the

judges for refusing the writ to Thomas Gordon, which, they said, was the "undoubted right and great privilege of the subject." In the assembly of Maryland, in 1725, the benefit of the writ's provisions was claimed, independent of royal favor, as the "birthright of the inhabitants." The refusal of Parliament, in 1774, to extend the writ to Canada, was denounced by the Continental Congress, in September of that year, as oppressive; and subsequently this was recounted in the Declaration of Independence as one of the manifestations on the part of the British government of tyranny over the colonies.

CHAPTER II.

PRACTICE AND PLEADINGS.

10. **How and when proceedings begin.**—Proceedings begin with a motion for leave to file a petition; except that, in Great Britain and in most of the United States, a quo warranto information, by the attorney-general, may be filed without leave of court; though, in some states, if the attorney-general merely allows the use of his name, as is sometimes done, the information cannot be filed without leave of court. A petition for certiorari generally will lie only after a final adjudication; but it is held in Massachusetts[12] that this principle is not applicable to the writ when designed for the review of municipal proceedings, in which case the time for its allowance is discretionary. A petition for prohibition, on the other hand, generally will lie only before a final adjudication; except that, where the want of jurisdiction appears on the face of the proceedings, prohibition will lie after judgment, if anything remains to be done. The petition sets forth such facts as prima facie entitle the petitioner to the relief which he seeks; and in many states it must be supported by affidavit. It concludes with a prayer for an order, or rule, to the respondent to show cause why a writ should not issue. The service of notice upon the respondent suspends the proceedings of which the petition complains, though

[12] Hancock v. Boston, 1 Metc. 122 (Mass.).

in Henry v. Steele[13] the court refuses to hold the judge of the inferior court in contempt for proceeding after notice of a petition for prohibition, but questioned the propriety of his action.

11. **Demand and refusal.**—Mandamus is not granted in anticipation of the omission of a duty, but only when the time has come for the performance and the duty has not been performed; and if the duty be of a private nature, previous to making application for the writ, an express and distinct demand, designating the precise thing required, must have been made by the petitioner upon the respondent; and it must appear that the respondent refused to comply with such demand, either in direct terms or by conduct[14] from which a refusal can be inferred; but if the duty be of a public nature, and due to the petitioner in the same way in which it is due to every other citizen, "the law itself stands in lieu of a demand, and the omission to perform the required duty, in place of a refusal." Prohibition[15] also is not granted in anticipation that the respondent will do something which he ought not to do. Likewise if the objections were not raised before the inferior tribunal, the petitioner cannot seek redress by certiorari,[16] because the writ is not granted to review those matters which might have been, but were not, objected to in the court below. Although the rule is the same when the petitioner seeks redress by prohibition, there is an exception in favor of persons

[13] 28 Ark. 455.
[14] Attorney General v. Boston, 123 Mass. 460.
[15] Prignitz v. Fischer, 4 Minn. 366.
[16] Cousins v. Cowing, 23 Pick. 208 (Mass.).

whose interest entitles them to the writ, but who, owing to their not being parties to the suit below, had no opportunity to make objection. Prior objection is unnecessary if the tribunal had no jurisdiction.

12. **Who may be the petitioner.**—These writs formerly were not writs of right, but purely prerogative writs, issuable only at the pleasure of the sovereign, and therefore only in his name; and even now, in some instances, while the writs may enforce a private interest, unconnected with any public interest, the fiction of a public interest is retained, and then the proceedings begin in the name of the sovereign,[17] upon the relation of the party aggrieved, who must show some personal interest,[18] though the interest may be slight;[19] and sometimes the fact that he is a citizen,[20] and, as such, interested in the execution of the laws, is enough. If, however, the right to be enforced is private and personal, then the state must not be used as a petitioner.[21] A petition for mandamus[22] may be brought by anyone having a private right for the enforcement of which the law provides no other adequate remedy; and a petition for prohibition[23] against a court acting without jurisdiction may be filed at the instance of any one of the parties, or even of a stranger. In Maine, Massachusetts, Minnesota, and some other states, only a party

[17] State v. Commissioners, 5 Ohio St. 497.
[18] People v. Crotty, 93 Ill. 180.
[19] State v. Francis, 95 Mo. 44.
[20] People v. Sub. R. R. Co., 178 Ill. 594.
[21] Morris C. & B. Co. v. State, 14 N. J. L. 411.
[22] McCarthy v. Boston, 188 Mass. 338.
[23] Trainer v. Porter, 45 Mo. 336.

to the record can obtain the writ of certiorari. But in other states[24] it is sufficient if the petitioner be interested in the subject matter upon which the record acts. In Missouri, after the attorney-general and the prosecuting attorney of the county have refused to act, a writ of certiorari may be granted, upon the application of a taxpayer of a township, to revise the action of the county court in granting a license to keep a dramshop in such township. It is held in most states that individuals cannot use quo warranto, either of right or by leave of court. But in Connecticut, Missouri, Georgia, Colorado, and New Jersey, it is held that any citizen or taxpayer has sufficient interest to enable him to maintain quo warranto proceedings to oust the unlawful incumbent of a municipal office; and in Massachusetts, any person whose private right is put in hazard by the exercise of a franchise not conferred by law may apply to the supreme judicial court for leave to file an information, and judgment may be entered that the corporation be excluded from the exercise of such franchise. A petition for habeas corpus may be filed, not only by the person under arrest, but also by any other person who has an interest in the prisoner,[25] as for instance by the master, when his apprentice is a prisoner, and by parents and guardians, when a minor is a prisoner. Yet, as in such cases the proceeding is to remove restraint, rather than to enforce the claim of private custody, the prisoner, if an adult of sound mind, generally is permitted to go at large;

[24] Dexter v. Cumberland, 17 R. I. 222.

[25] Commonwealth v. Harrison, 11 Mass. 63.

if an infant of discretion, to elect in whose custody he will remain; and if of tender years, without such discretion, the court determines the custody, according as the infant's welfare may at the time require; the petitioner cannot control the proceedings, and cannot appeal from the decision of the court.

13. **Who may be the respondent.**—If the duty is imposed on a particular officer of a corporation, the party seeking to have the duty performed must proceed against that officer; he cannot proceed against the corporation as such to compel it to perform the duty; nor can he proceed against the corporation to compel it to coerce the officer; and, where the power and duty are lodged with the governing body, the petition is directed to such body and not to the municipality in its corporate name. Mandamus directed to the "mayor and aldermen" of a city, if they constitute the government of a city, is correct, although the city is incorporated under a name, and has power to sue and be sued. The respondent named in a petition for prohibition is the inferior court,[26] in which the suit is pending; and it is the better practice[27] that the other parties to the suit be joined also as respondents. If, however, the suit complained of is brought by the government, then the only respondent is the court.[28] In People v. Spring Valley,[29] Mr. Justice Magruder says: "When an existing corporation abuses any of its franchises, or usurps franchises which do not belong to it, the information

[26] Conn. River R. R. Co. v. Franklin, 127 Mass. 50.
[27] London v. Cox., L. R. 2 H. L. 239 (Eng.).
[28] Smith v. Whitney, 116 U. S. 167.
[29] 129 Ill. 169.

should be against the corporation as such. But when a number of individuals unlawfully assume to be a corporation, the information should be against them as individuals, and not by their corporate name." So, in People v. R. & S. Railroad Co.,[80] the court says: "If the information had for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should have been filed against individuals; if the object was to effect the dissolution of a corporation which had had an actual existence, or to oust the corporation of some franchise which it unlawfully exercised, then the information is correctly filed against the corporation. When an information is filed against a corporation by its corporate name, the existence of the corporation is admitted; or, rather, that it once had legal existence." This rule which makes the joinder of a corporation as a party respondent an admission of corporate existence does not apply to municipal corporations, since it would be impossible to make every inhabitant a defendant. Where, then, the object of the proceeding is to try the title of persons assuming to be the officers of a pretended municipality, on the ground that its organization is invalid, such pretended officers should be made respondents, without joining with them the alleged corporation. Where a continuing duty is incumbent upon certain public officers, and the object of proceedings is to enforce a right against the community, through such officer, the action is regarded as being against the office, to compel the performance of a duty devolving

[80] 15 Wend. 114 (N. Y.).

upon it,[81] regardless of the incumbent; and so, when it is the duty of a county clerk to report all fees received during his term of office, and to pay into the county treasury the excess of money thus received above that which he is entitled to retain for his services, this duty may be enforced by mandamus, notwithstanding the expiration of his term of office.

14. **The alternative writ.**—If the petition be for mandamus, the courts in most states, in place of a rule to show cause, order an alternative writ to be issued, which commands the respondent to perform the act required of him, or show cause for not doing it. The alternative writ is looked upon in these states as the first formal pleading; and the petition, and the affidavits upon which the writ was obtained, are not considered a part of the record, and they cannot be used to support the allegations in the alternative writ. Therefore, the alternative writ must contain, specifically stated, all the averments of fact upon which the petitioner bases his right of action; and a mandatory clause should be added, specifically setting forth the thing required of the respondent. In Massachusetts and in Vermont, however, it is not the practice to issue an alternative writ, but to hear the merits of the case upon the petition and answer.

15. **The answer.**—Prior to the reign of Queen Anne, the return to the alternative writ, corresponding to the answer to the petition, was incontrovertible, and the remedy, if the return was untrue, was an action for damages. Now, however, both the petition and the answer, or the alternative writ and the return,

[81] Prescott v. Gonser, 34 Iowa 175.

are mere statements; and the petitioner may controvert the truthfulness of a return to an alternative writ by a motion to require the respondent to show cause why he should not be attached for contempt for disobeying the order of the court. Amendments, both to the petition and to the answer, are allowable at any stage of the proceedings. The respondent may claim a legal or an equitable excuse, and may rely upon facts which have occurred since the petition was filed. He also may demur to the petition; and, if an alternative writ has been issued, he may move to quash it, which motion is the same as a demurrer to the petition. The petitioner for habeas corpus, or the prisoner, may deny the facts as set forth in the return, or may allege any other material facts, in each case under oath; and this denial or allegation may be amended by leave of the court.

16. **An ordinary remedy a bar.**—Whenever there is open to the petitioner another adequate remedy, his petition for these writs will not be granted.[32] A petition, therefore, for mandamus, to compel a transfer of corporate shares, will not be granted, the court says in Stackpole v. Seymour,[33] if the petitioner can be indemnified by an action for damages; although in a similar case mandamus was granted in the Exchequer Chamber; but the judgment was reversed in the House of Lords.[34] A like petition, however, by the corporation itself, to secure to it the benefit of its organization, will be granted.[35] Quo warranto

[32] Re Chetwood, 165 U. S. 443.
[33] 127 Mass. 104.
[34] R. v. Shropshire Union Railways, L. R. 8 Q. B. 420; 7 H. L. 496 (Eng.).
[35] Amer. Ry. Frog Co. v. Haven, 101 Mass. 398.

will not lie against a turnpike company, charged with having opened its road through the petitioner's land, without agreeing as to the compensation, and without having the damages ascertained in the manner provided by law, since in such case the corporation is a trespasser, and relief may be had by an ordinary action. Also if an adequate review by appeal is open to the petitioner, a writ of prohibition will not issue.[36] Yet in M. & C. R. R. Co. v. Brannum,[37] where the railroad applies for certiorari, the court says: "By appeal from judgments of justices of the peace the case must be tried, de novo (anew), without regard to any defect in the summons or other proceedings before the justice. Such an appeal would have operated as a waiver of all defects in the summons, and would not be the ample redress necessary to be afforded by appeal in order to supply the place of the remedy by the common law certiorari." And in State v. Guinotte,[38] the court says: "It has been broadly stated that certiorari will not issue where remedy exists by either appeal or writ of error. But the statement, though frequently met with in text writers, and in some reports, is neither strictly true, nor accurate; there are marked exceptions. An adequate remedy is a remedy which is equally beneficial, speedy, and sufficient, and not merely a remedy which at some time in the future will bring about a review of the judgment in the lower court, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the

[36] State v. Cory, 35 Minn. 178.
[37] 96 Ala. 461.
[38] 156 Mo. 513.

inferior court or tribunal." In the fifth circuit of the United States the Circuit Court of Appeals issued a mandamus to the circuit judge to vacate a certain order, although the question might have been raised by writ of error, on the ground of expense and delay. And in R. v. L. & N. W. Ry. Co.,[39] Baron Pollock says there are many cases in which a prerogative writ ought to be granted for the purpose of speedy justice.

17. **A statutory remedy generally a bar.**—Whenever a specific remedy is provided by statute, resort must be had to it,[40] and not to an extraordinary remedy. But in California it is held that where a new right and a remedy for its invasion are comprised in the same statute, although individuals are confined to the statutory redress, this does not apply to the state; and that the two remedies are distinct: the one belonging to the individual, as a power granted, and the other to the people, in the right of their sovereignty.

18. **Another remedy must be adequate to be a bar.**—Though other remedies exist, if they are inadequate to afford the particular relief to which the party is entitled, the writs will issue. In Mobile & Ohio R. R. Co. v. Wisdom,[41] a petition for mandamus to compel the company to receive, in payment for passage over its road, certain tax receipts, the objection is made that, as the petitioner might have his action for damages, he cannot have mandamus; and the court says: "It is far from being clear that the remedy by action

[39] 2 Q. B. 512 (Eng.).
[40] R. v. Morton, L. R. 1 Q. B. 39 (Eng.).
[41] 5 Heisk. 125 (Tenn.).

for damages would be equivalent to a specific execution of the obligation." In Richmond Ry. & Elec. Co. v. Brown,[42] the court says: "In the case at bar the mandamus was sought to compel the plaintiff in error to transfer the defendant in error from one to another of its street cars, without additional charge. If the defendant in error was entitled, as alleged, to the transfer, it is manifest that a suit at law for the damages for a failure to perform that duty was not an adequate remedy, and would not actually compel the performance of the duty in question. The wrong suffered was a constantly recurring and continual one, and, whatever may have been the result of the repeated suits for damages, the remedy was not as convenient, as beneficial or as effective, as the proceeding by mandamus." In Ransom v. Boston,[43] of a petition against the mayor to reinstate the petitioner in his employment as a laborer, the court says: "The petitioner has no such plain and adequate remedy by an action for damages that he should be denied relief in this manner. Successive actions for the amount of his wages, as these should accrue from time to time, would be far from giving him adequate redress. He has a right to receive the full amount of his wages, not lessened by the expense of recurring litigation. It is only in such a proceeding as this that a full measure of relief can be given to him." Similarly it is held in New York,[44] that a statute which provides for the recovery by suit of illegal taxes paid under protest, is not such an adequate remedy as to prevent

[42] 97 Va. 26.
[43] 193 Mass. 537.
[44] Re Coogan, 59 N. Y. S. 111.

the issue of mandamus, to compel the reduction of the assessment.

The existence of a remedy by an action in damages against a public officer for neglect of duty does not supersede mandamus, since such an action only affords pecuniary compensation and does not compel the performance of the specific duty required. So a remedy by indictment[45] for neglect of duty constitutes no objection to granting extraordinary aid, because an indictment is merely punitive, and not remedial, and can only punish the neglect of duty, without compelling its performance. Also a suit on the official bond of an officer is not an adequate remedy.[46] But it is held that mandamus, to compel a probate judge to pay over money wrongfully retained, should be refused, there being an adequate remedy by action upon his official bond; also where it is sought to compel a delinquent tax collector to pay over a tax within the time prescribed by his warrant and bond.

19. **A remedy in equity not a bar.**—That remedy, which will bar relief, is a remedy at law;[47] and an equitable remedy is not a conclusive objection, unless the parties already have invoked the aid of that remedy, although it may influence the court in the exercise of its discretion in the particular case. But in Massachusetts a remedy in equity which will give full and adequate relief, is a bar to a petition for prohibition,[48] mandamus,[49] and quo warranto; and

[45] Ayres v. State Auditors, 42 Mich. 422.
[46] Elliott County v. Kitchen, 14 Bush. 289 (Ky.).
[47] People v. Treasurer, 24 Mich. 468.
[48] Jaquith v. Fuller, 167 Mass. 123.
[49] Attorney General v. N. Y., N. H. & H. R. R., 197 Mass. 194.

in Ohio[50] to a petition for mandamus. In accordance with the general principle denying equitable relief when redress may be had by law, quo warranto, to test the right to an office or franchise, ousts all equitable jurisdiction of the case. And, since this remedy is applicable the moment the office or authority is usurped, an injunction will not lie to restrain the exercise of official functions,[51] when there has been no actual entry upon the office, because the party aggrieved can wait until an attempt is made to exercise the functions, and then pursue his remedy by quo warranto. Nevertheless in Massachusetts,[52] it is held: "The fact that a party is entitled to apply for a quo warranto, does not deprive him of his remedy by bill in equity in case of a private nuisance."

20. **Discretion of the courts.**—The courts exercise a discretion whether they will issue or refuse these writs;[53] and they will not issue them unless the petitioner satisfies the court that substantial justice requires it; nor when the equities[54] are against the petitioner; nor where they will work hardship to third parties not before the court; as, for instance, the court refused mandamus against the commissioner of the land office for procuring a title to public land, when other parties, claiming title to the land, were not represented in the proceedings; and in Oakes v. Hill,[55] the court declined to issue a mandamus, because it might affect the rights of persons who

[50] State v. Carpenter, 51 Ohio St. 83.
[51] Updegraff v. Crans, 47 Pa. St. 103.
[52] Fall River Iron Works v. O. C. & F. R. R., 5 Allen 221 (Mass.).
[53] Effingham v. Hamilton, 68 Miss. 523.
[54] Wentworth Co. v. French, 176 Mass. 442.
[55] 8 Pick. 47 (Mass.).

had no opportunity to be heard. The courts generally will refuse mandamus when the duty to be enforced is so complex that they cannot superintend the performance.[56] In some states discretion is limited to cases where relief is sought in aid of private rights, and the writs must issue on behalf of the sovereign.[57] They seldom are issued for defects of form and not of substance in the proceedings.[58] Since it is discretionary with the court whether to grant or deny these writs, it is held in New York[59] that there is no appeal to the court of appeals; but the contrary is held in California.[60]

21. **The trial.**—The writs are not granted by default;[61] and the issues are tried in the same manner as in ordinary actions. The facts cannot be determined by affidavits, but by testimony, taken by depositions, or by calling witnesses. In England and in several states, issues of fact are tried by a jury; but in some states a jury cannot be demanded as of right. Since the Seventh Amendment to the Constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," proceedings in the federal courts,[62] where there is an issue as to damages, must go to a jury. In Florida and Idaho it is held that, in quo warranto, the right of trial by jury, as to issues of fact, existed

[56] Northern Pacific R. R. v. Dustin, 142 U. S. 492.
[57] State v. Doyle, 40 Wis. 220.
[58] Reed v. Curry, 40 Ill. 73.
[59] People ex rel. Adams v. Westbrook, 89 N. Y. 152.
[60] Havemeyer v. Superior Court, 84 Cal. 327.
[61] Freetown v. Bristol County, 9 Pick. 46 (Mass.).
[62] Chamberlain v. Warburton, 1 Utah 267.

at common law, and is preserved under a constitutional guaranty providing that "the right of trial by jury shall be secured to all, and remain inviolate forever." The New York code provides "that an issue of fact, joined upon an alternative writ of mandamus, must be tried by a jury." The right to a jury trial has not been conferred by the Fourteenth Amendment to the Constitution of the United States.

22. **Costs.**—At common law no costs were allowed. Subsequently costs were allowed by statute in some cases, both in England and in the United States. Now costs usually are given to the prevailing party; but they are in the discretion of the court, and they may be awarded or refused according as the circumstances of each case may require.

23. **Jurisdiction—King's Bench and the United States Supreme Court.**—In England[63] the Court of King's Bench, by virtue of its prerogative power as superintendent over all other courts, tribunals, and public officials, may examine any of their proceedings by the issue of these writs; but the Supreme Court of the United States,[64] under the Constitution, has no jurisdiction to issue these writs, except in cases affecting ambassadors, other public ministers, and consuls, and those in which a state is a party. Since, however, the Supreme Court has admiralty jurisdiction under the Constitution, it may issue writs of prohibition to the district courts,[65] when proceeding as courts of admiralty. Also, if the Supreme

[63] R. v. Glamorganshire, 1 Lord Raymond, 580 (Eng.).
[64] Marbury v. Madison, 1 Cranch 137 (U. S.).
[65] Ex parte Christy, 3 How. 292 (U. S.).

Court already has acquired jurisdiction of any cause, by appeal or writ of error, then it may issue these extraordinary writs in such cause,[66] in aid of its jurisdiction.

24. **Same subject—Other federal courts.**—The other courts of the United States have not received jurisdiction to issue the extraordinary writs, except the writ of habeas corpus in certain cases, though Congress could give jurisdiction, since there is no constitutional difficulty, as in the case of the Supreme Court. But they may issue these writs as incidental to the other powers conferred upon them, and in aid of their jurisdiction. An exception was made, however, as early as 1838, in the case of Kendall v. United States,[67] in which it is held that the common law of Maryland passed with the cession of, and continued a part of the law of, the District of Columbia, and gave a right in the Circuit Court for the District of Columbia, wherever such right existed at common law. Also, it is held in United States v. Schurz,[68] that its successor, the Supreme Court for the District, may issue mandamus, even to officers of the executive departments of the national government. Thus control of federal officers by federal courts is made possible.

25. **Same subject—State courts.**—In those states where the courts of last resort are vested only with appellate power, they may issue the extraordinary writs[69] only in aid of the appellate jurisdiction.

[66] Re Birninger, 7 Blatch. 159 (U. S.).
[67] 12 Peters 524 (U. S.).
[68] 102 U. S. 378.
[69] State v. Tracy, 94 Mo. 217.

Where they are courts of original jurisdiction, they may issue these writs, it is held in Harriman v. Waldo County,[70] upon the ground that, in every well-constituted government, the highest judicial authority must have a supervisory power over all inferior tribunals, for the prevention and correction of errors and abuses, where the laws do not expressly provide a remedy. Jurisdiction to issue the writs has been conferred by statute in some states upon county courts, justices' courts, and probate courts; and upon clerks of court, court commissioners, and justices of the peace; though the power of a ministerial officer to exercise an authority which is judicial in its nature, has been questioned.

[70] 53 Me. 83.

PART II

THE REMEDIES IN PARTICULAR

CHAPTER III.

MANDAMUS.

26. **Jurisdiction of federal and state courts.**—Whether the Supreme Court of the United States has authority to issue mandamus to a state court has not been decided; though the appellate jurisdiction, conferred by the Constitution, would seem to carry with it all the coercive requisites to support it. It also is doubtful whether it is within the power of Congress to confer upon the Circuit Court of the United States authority to compel by mandamus the removal of a cause from a state court. If, however, the state court is charged with duties which are administrative rather than judicial, as for instance, a county court to levy a tax for the payment of county bonds, then the Circuit Court of the United States may compel the county court to make the levy.[71] A state court cannot issue mandamus to a federal court.

27. **Against corporations.**—Mandamus formerly was confined to public corporations;[72] but the English courts now, and the American courts generally, issue the writ in the case of trading corporations,

[71] Shelley v. St. Charles County, 30 Fed. 603.

[72] R. v. London Assurance Co., 5 Barn. & Ald. 898 (Eng.).

though no public interest is involved. Railroad, gas, water, telegraph, and like corporations, are public corporations, against which the writ will issue.[73] Therefore, mandamus will compel a railroad to increase the number of its trains,[74] to stop at a station, to furnish suitable station accommodations,[75] and to construct crossings;[76] a telephone company to furnish a telephone;[77] and a gas company to furnish gas.[78] In some states it is held that the state has visitorial power over all corporations created by it, whether public or private; and by mandamus may compel[79] them to perform a specific duty, imposed upon them by their charters, by statute, by ordinance, or by the common law,[80] not only on the relation of the attorney-general in the case of a public duty, or on the relation of a municipality, or of some particular public officer or board, but also on the relation of a member of a corporation, or other individual, whose rights are violated. Nevertheless it generally is held that mandamus will not issue to enforce the by-laws of religious or social associations,[81] unless there are property rights involved.

28. **Against officers.**—Although here the writ is granted more freely now than it was formerly, and the distinction between public and private officers is not always made, nevertheless, it must be an office

[73] People v. N. Y. C. & H. R. R. Co., 28 Hun 543 (N. Y.).
[74] Ohio & M. R. Co. v. People, 120 Ill. 200.
[75] People v. N. Y., etc., Railroad, 17 Abb. N. C. 304 (N. Y.).
[76] Boggs v. Chicago B. & Q. Railroad, 54 Iowa 435.
[77] State v. Citizens' Tel. Co., 61 S. C. 83.
[78] Mackin v. Portland Gas Company, 38 Oregon 120.
[79] State v. Chamber of Commerce, 47 Wis. 670.
[80] State v. Republican Valley Railroad, 17 Neb. 647.
[81] Barrows v. Mass. Med. Society, 12 Cush. 402 (Mass.).

and not a mere service or employment. Where a member of a board of police commissioners kept the records of one of their meetings, at the request of his associates, in the absence of their regular clerk, and made certain errors therein, the court refused to issue mandamus to compel him to correct these errors upon the ground that he was rendering a mere service and not an official duty.[82] So, if the person who has the books of a corporation, did not get them by virtue of any official relation to the corporation, and is merely a trespasser, mandamus will not issue against him. Mandamus will issue to compel a man to accept a public office, to which he has been duly and legally appointed. In Great Britain the courts will not issue the writ against the lords of the treasury,[83] or the secretaries of state, or other like high officers, on the ground that their duty is to the king, and they are his servants, and to issue the writ would be like the king issuing a mandamus to himself. Mandamus also does not issue to the President of the United States,[84] because his duties are political, and he is beyond the reach of any other control than impeachment. But mandamus may issue, for the performance of ministerial duties clearly imposed by Congress, from the Supreme Court of the District of Columbia, against heads of departments. There is a conflict[85] of authorities whether mandamus may issue from a state court to the governor; but in most states, even though the courts will not coerce the gov-

[82] Pond v. Parrott, 42 Conn. 13.
[83] R. v. Lords of the Treasury, 7 Q. B. 387 (Eng.).
[84] Kendall v. United States, 12 Pet. 524 (U. S.).
[85] Sutherland v. Governor, 29 Mich. 320.

ernor, they do not hesitate as against other officials; though, if jurisdiction against the governor fails, because of the isolation between the three departments of the government, then logically mandamus may not issue against any executive officer or agent.[86]

29. **Same subject—Federal and state officers.**—A state court cannot issue mandamus to a federal officer, because his official conduct can be controlled only by the power which created him. Neither can a federal court issue the writ against a state officer, except that a federal court may issue the writ to county officers[87] to levy a tax for the payment of a judgment, upon the ground that the Circuit Court, having jurisdiction under the Constitution in causes between persons of different states, must have authority to enforce its judgment. Mandamus may issue from a state court to a state official to compel obedience to a judgment of a federal court, as in Brown v. Crego,[88] to a county treasurer to compel payment from county funds of a judgment rendered against the county in a federal court; and in State v. Beloit,[89] to the town officers to compel the levy of a tax for the payment of a judgment rendered against the town in a federal court.

30. **Same subject—Title to office.**—If another is in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to mandamus, but must resort to quo warranto, in New York,[90]

[86] Secombe v. Kittelson, 29 Minn. 555.
[87] Riggs v. Johnson County, 6 Wall. 166 (U. S.).
[88] 32 Ia. 498.
[89] 20 Wis. 79.
[90] People v. New York, 3 Johns. Cases 79 (N. Y.).

Georgia,[91] Missouri,[92] Nebraska,[93] and most of the United States, and in England;[94] but in Massachusetts,[95] Virginia, Maryland,[96] Michigan,[97] and some other states, this rule has not been followed; and the proper remedy is by mandamus.

31. **What duties it enforces.**—Mandamus compels the performance only of such duties as are purely ministerial, obligatory under a statute, or as a necessary result of the office, and so specific that no discretion[98] is left in their performance. Therefore, it will not lie to compel the postmaster-general[99] to readjust a postmaster's salary; nor to compel the Secretary of the Interior[1] to order the Commissioner of the Land Office to cancel an entry for land; nor to compel the auditor to audit and allow certain claims; nor to compel assessors to make an abatement of the petitioner's tax;[2] for the duty in each case clearly requires the exercise of discretion. It sometimes happens, however, that the same duty is considered to be discretionary in some jurisdictions and ministerial in others. For instance, the duty of public officers, required to let a contract to the lowest bidder, usually is regarded as discretionary and not subject to mandamus; but in State v. Board of Education of Dela-

[91] Bonner v. State, 7 Ga. 473.
[92] State v. Rodman, 43 Mo. 256.
[93] Anderson v. Colson, 1 Neb. 172.
[94] R. v. Phippen, 7 A. & E. 966 (Eng.).
[95] Re Strong, 20 Pick. 484 (Mass.).
[96] Harwood v. Marshall, 9 Md. 83.
[97] Lawrence v. Hanley, 84 Mich. 399.
[98] Prov. Sav. L. Ass. Soc. v. Cutting, 181 Mass. 261.
[99] United States v. Key, 3 McArthur 328 (U. S.).
[1] Gaines v. Thompson, 7 Wall. 347 (U. S.).
[2] Sears v. Assessors, 208 Mass. 208.

ware County[3] it is held to be ministerial and to be enforced by mandamus.

An appointment to an official position, even if but a clerical position, is one involving the exercise of judgment;[4] therefore, it is an act over which the courts have no supervising power. Since the power of removal from office is incident to the power of appointment, the action of the Secretary of the Interior in removing a man from office, on account of inefficiency, is beyond review in the courts. But in McCarthy v. Emerson,[5] as to a petition for mandamus to the superintendent of streets in Boston, to restore the petitioner as foreman, the court says: "There is no doubt the reason assigned for the removal, neglect of duty, was a sufficient cause; and there is no doubt that if he was given a hearing upon this charge the respondent's conclusion was final and cannot be reviewed by this court, but the petitioner has had no such hearing. He was not allowed to know anything of the evidence on which the charge and specifications against him were based. He was merely allowed to make such statement as he desired. The removal was unlawful, and a peremptory writ of mandamus must issue as prayed for." When an officer's only reason for refusing to perform a duty is his erroneous construction of the law regulating that duty, the court will compel its performance.[6] Obligations which rest upon contract and involve no question of official duty, cannot be enforced by mandamus.

[3] 42 Ohio St. 374.
[4] Keim v. United States, 177 U. S. 290.
[5] 202 Mass. 352.
[6] Rice v. Commissioners, 13 Pick. 225 (Mass.).

CHAPTER IV.

PROHIBITION.

32. **When issued to a court.**—When the jurisdiction of a court, or of a tribunal, depends upon an act which is unconstitutional, proceedings therein may be restrained by prohibition; and while the most frequent occasions for the writ are where a court entertains some cause over which it has no jurisdiction, the necessity for the writ is the same[7] where, in a matter of which such court has jurisdiction, it goes beyond its legitimate powers; as when the petitioner, who had been ordered to appear in person to show cause in a contempt proceeding, appeared by counsel, the writ was issued to prevent the execution of an order for his arrest, it being held[8] that the court had not the power to make such an order. The writ will issue to a court martial,[9] as well as to an ordinary civil court.

33. **When issued to other tribunals.**—Boards, commissions, and officials, when invested with judicial powers, may be confined within the limits of their authority, when exercising such powers, but cannot be interfered with in their ministerial acts. Therefore, a tax collector, being a ministerial officer, cannot be restrained by prohibition from collecting

[7] Appo v. People, 20 N. Y. 531.
[8] Gordan v. Buckles, 92 Cal. 481.
[9] State v. Hopkins, Dudley 101 (S. C.).

a tax; and a city council[10] cannot be restrained by prohibition from investigating charges against the city solicitor, with a view to his removal from office; nor can it be punished for contempt in refusing to obey the writ. If, however, the council proceeds to try the solicitor upon these charges, then it would be exercising a judicial power and could be restrained by prohibition.

[10] Lodge v. Fletcher, 184 Mass. 238.

CHAPTER V.

CERTIORARI.

34. **Not issued to a common law court.**—This writ is issued to an inferior court when its proceedings are not according to the course of the common law, and therefore a writ of error will not lie. In Ex parte Randall,[11] a petition for certiorari to quash the proceedings of the superior court in removing the petitioner from practice, the court refuses the writ on the ground that "the power to remove an attorney for misconduct is incident to all common law courts, and the proceedings in such cases are to be deemed to be taken according to the course of the common law." So, in Lynch v. Crosby,[12] it is held that certiorari does not lie to quash the proceedings of a police court in issuing a warrant for the seizure of liquors, as such proceedings are according to the course of the common law. In Massachusetts and Illinois certiorari does not, and in Alabama, Arkansas, Michigan, Minnesota, Missouri, and many other states, it does lie to probate courts. So, in Massachusetts and South Carolina, it does not, and in New York and Tennessee it does lie to courts martial. It does not lie to a court which does not keep a record. So, where certain persons agreed, in writing, to submit all matters in difference between them to

[11] 11 Allen, 472 (Mass.).
[12] 134 Mass. 313.

three arbitrators, and the arbitrators made an award, and one of the persons, being dissatisfied, asked for certiorari, requiring the arbitrators to certify to court the submission and award, and all things touching and concerning the same, the court refuses the petition.[13]

35. **Other tribunals.**—The proceedings subject to review by certiorari are those of any tribunal, board, or officer, when acting in a judicial manner; and it "is not essential[14] that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes called quasi-judicial. The body of officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others, they act judicially in making their decision, whatever may be their public character." On the other hand to call a tribunal a court does not make it a judicial body in all its acts. "A county court is certainly a judicial body for some purposes, but no more so for the name, nor for the fact that it has a seal and a clerk and keeps a record. The making a subscription to the stock of a railroad company" by the county court is not judicial, but administrative, and therefore it is not subject to certiorari.[15] "The character of the act, rather than of the tribunal by which the act is done, is the test. The functions exercised by a municipal corporation may be legisla-

[13] Whitehead v. Gray, 12 N. J. L. 36.
[14] Drainage Commrs. v. Griffin, 134 Ill. 330.
[15] Re Saline County Subscription, 45 Mo. 52.

tive, administrative, or judicial, but only the acts done by it when exercising judicial functions can be reviewed under this procedure. The act does not cease to be legislative because the members of the city council are required to exercise their judgment."[16] The tribunal issuing certiorari must be established by law; and the action, therefore, of a medical association[17] in expelling a member is not subject to certiorari, since it is not a legal tribunal.

36. **What errors it corrects.**—At common law the writ called into question only the jurisdiction of the tribunal; but in Massachusetts, New York, Iowa,[18] and some other states, the writ extends to the review of all questions of jurisdiction, and also of all questions of regularity in the proceedings; but only to correct errors in law[19] and not the findings of fact. Certiorari was adopted in New York early in the history of that state, and was modeled upon the writ as administered in England under the common law, so that it brought into question the jurisdiction only, and not any question of law or fact upon the merits of the case. Until 1840 the decisions are consistent in applying the old rule that certiorari reviews only the jurisdiction; but about this year doubt began to be entertained whether questions of law also might not be considered by the courts. Accordingly, by small degrees, a departure was made from the old rule by some courts, although others refused to enlarge the functions of the writ. This

[16] Quinchard v. Alameda, 113 Cal. 664.
[17] People v. Med. Soc., 32 N. Y. S. 415.
[18] Smith v. Supervisors, 30 Iowa 531.
[19] Re Hayward, 10 Pick. 358 (Mass.).

conflict became so apparent in 1865 that Mr. Justice Morgan, in Baldwin v. Buffalo,[20] says no settled rule had been established, from which the courts had not subsequently departed. That case, however, holds that certiorari might bring up so much of the evidence as was necessary to present the question of law upon which the petitioner relied, to avoid the determination of the tribunal. Following this decision, there are a number of cases which settle the law to be that the writ takes up questions of law as well as jurisdiction, but that questions of fact cannot be considered.

[20] 35 N. Y. 375.

CHAPTER VI.

QUO WARRANTO.

37. **Against corporations—Municipal.**—The English reports afford frequent instances of the use of the information for municipal affairs, the most famous being the information filed in the reign of Charles II. Since he was in want of money, and was unwilling to summon Parliament, he caused informations to be brought against most of the towns in the kingdom, upon a supposed, or frequently a real, forfeiture of their franchises, by neglect or abuse; and the liberties of most of them were thrown into the hands of the king, who granted them fresh charters, with such alterations as he thought expedient; but meanwhile their revenues were in his hands. Eighty-one quo warranto informations were presented against municipal corporations during the reigns of Charles II and James II. The notorious Jeffreys "made all the charters, like the walls of Jericho, fall down before him, and returned laden with surrenders, the spoils of towns." The writ against London alleged two misdemeanors: tolls on goods brought into market, and the petition of the city to the king to summon Parliament. Judgment of forfeiture was obtained from the King's Bench; and, as a condition of the restoration of the charter, it was provided that thereafter the mayor, sheriff, and clerk should not exercise their offices without the king's consent; and

that, if the king twice disapproved of the officers elected by the corporation, he might himself appoint others. After the accession of William and Mary a bill was passed to restore the rights of the English towns; the judgment against London was reversed by statute, and by the same statute it was enacted that the franchises of the city never more shall be forfeited for any cause whatsoever.

There is no instance in the United States where a municipal charter has been forfeited on account of the misconduct of its officers. Upon an information, however, to oust persons assuming to act as municipal officials, the court may determine, it is held in some states, whether there is a law authorizing the organization of the municipality.[21] The courts will oust municipalities[22] from the exercise of franchises which were not granted them by their charters. The authorities are conflicting[23] whether the information may be used to test the legality of the exercise of corporate powers outside of municipal boundaries.

38. **Same subject—Other corporations.**—An information lies against a corporation which acts beyond the powers conferred upon it,[24] even though it is engaged in interstate commerce;[25] it will lie to prohibit a foreign corporation[26] from exercising its franchises within a state, without permission, although the courts have no power to affect by their judgments the corporate existence of a foreign cor-

[21] State v. Weatherby, 45 Mo. 17.
[22] People v. Oakland, 92 Cal. 611.
[23] Stultz v. State, 65 Ind. 492.
[24] Attorney General v. Perkins, 73 Mich. 303.
[25] State v. Cincinnati, etc., R. Co., 47 Ohio 130.
[26] State v. F. & C. I. Co., 39 Minn. 538.

poration. Since it is a condition of incorporation that the grantees shall act up to the design for which they are incorporated, hence, through neglect or abuse of its franchises a corporation may forfeit its charter,[27] and in Terrett v. Taylor,[28] forfeiture for misuser or non-user is held to be "the common law of the land and a tacit condition annexed to the creation of every corporation." Both in Great Britain and in the United States contracts in restraint of trade are illegal; and, when corporations enter into a combination or trust, they are open to attack by quo warranto, because they have attempted to grant away the franchises which were conferred upon them, in breach of the implied condition that the particular grantees shall retain them, and because, in the creation of a monopoly,[29] they employ their franchises in an illegal act. But no reliable rules for determining to what extent competition may be bought off without contravening public policy against monopolies, can be laid down. The same facts have led to opposite decisions. So it is held in Attorney General v. Tudor Ice Co.,[30] an information on behalf of the commonwealth will not lie against a private trading corporation, to restrain it from engaging in a particular kind of business, where its proceedings are not shown to have injured any public rights, and are objected to only because they are not authorized by the act of incorporation.

39. **Franchises and powers.**—In State v. M. T. M.

[27] Mumma v. Potomac Company, 8 Pet. 281 (U. S.).
[28] 9 Cranch 43 (U. S.).
[29] Distilling, etc., Co. v. People, 156 Ill. 448.
[30] 104 Mass. 239.

Co.,[31] Mr. Justice Mitchell makes a distinction between franchises and powers, saying: "To be a franchise the right possessed must be such as cannot be exercised without the express permission of the sovereign power. The only franchise which corporations possess is the general franchise to be or exist as a corporate entity. Hence, if they engage in any business not authorized by the statute, it is in excess of their powers, but not a usurpation of a franchise not granted, nor necessarily a misuser of those granted. Acts in excess of powers may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture. How far they must go to amount to this the courts have wisely never attempted to define, except in very general terms, preferring the safer course of adopting the gradual process of judicial inclusion and exclusion as the cases arise. A dram shop license is held, in Martens v. People,[32] to be a public franchise for the forfeiture of which quo warranto will lie; but in Hargett v. Bell,[33] it is held that such a license is neither a franchise nor an office. In People v. Mutual Gaslight Company,[34] it is held that the right, conferred by ordinance upon a corporation, to lay gas pipes in the streets is not a franchise, but a local easement, and quo warranto will not lie against the company on the ground that it has forfeited the right to use the streets, by violating the conditions of the grant; but, where the statute extends the remedy

[31] 40 Minn. 213.
[32] 186 Ill. 314.
[33] 134 N. C. 394.
[34] 38 Mich. 154.

to privileges and licenses, as well as to franchises, then, it is held in People v. Chicago Telephone Company,[35] it will lie.

40. **Against officers—Public.**—In England[36] there was doubt at one time whether the information would lie only for offices created by charter of the king, or also for those created by act of Parliament; but the English law now appears to be that information will lie for usurping any office, whether created by charter alone, or by the crown, with the consent of Parliament, provided the office be of a public nature, and a real office, not merely the employment of a servant. Also in Haupt v. Rogers,[37] and in Attorney General v. Drohan,[38] it is held that an information to try the title to an office is confined to a public office and does not lie for an office in a private corporation or in a political party, since the judgment for removal would be nugatory, "for the corporation might immediately reinstate them."[39] To like effect is People v. Ridgely,[40] where the governor appointed Ridgely trustee of the assets of a state bank, and later removed him and appointed another, but Ridgely continued to hold the assets of the bank. Mr. Justice Breese says: "An information can only be resorted to in cases in which the public have some interest. These defendants have a high duty to perform, but it is to the creditors of the bank and its stockholders. The public, as such, have not a particle

[35] 220 Ill. 238.
[36] Darley v. The Queen, 12 C. & F. 520 (Eng.).
[37] 170 Mass. 71.
[38] 169 Mass. 534.
[39] Commonwealth v. Dearborn, 15 Mass. 125.
[40] 21 Ill. 65.

of interest in the matter. It is a clear case between trustees and cestui que trust—who are not the people." While the chief engineer of a railroad and a professor in a university are held not to be public officers, there is a diversity of opinion about a city[41] or county physician and a pilot. It is a public wrong, however, in some states, for one to administer an office in a private corporation, if there be no de jure corporation, since this is a usurpation of a corporate franchise; and it also is a public wrong if the privilege by the state has been abused. The respondent must be in actual possession of the office, and not a mere claimant; and therefore some use must be shown, but it has been held to be a sufficient showing of use if the respondent has taken the oath of office.[42]

41. **Same subject—Private.**—An intrusion into an office of a private corporation may be corrected by information, in several states, with the same propriety as in cases of public corporations, because in both cases an unfounded exercise of a corporate franchise is a usurpation of privileges granted by the state; in several states information is by statute the proper remedy to test the title to offices in private corporations. In Commonwealth v. Arrison,[43] Mr. Chief Justice Tilighman says: "In all cases where a charter exists, and the question arises concerning the exercise of an office claimed under that charter, the court may grant leave to file an information; because the party against whom the information is prayed has no claim but from the grant of

[41] Commonwealth v. Swasey, 133 Mass. 538.
[42] People v. Callaghan, 83 Ill. 128.
[43] 15 S. & R. 127 (Pa.).

the commonwealth, and an unfounded claim is a usurpation, under pretense of a charter, of a right never granted." But in People v. DeMill,[44] the court says: "Although the statute says the information may be filed against any person usurping office in any corporation created by authority of this state, yet there must be cases in which the court may refuse to listen to the controversy. When the proprietors of a country store, or the members of a village library association, or the participants in a village district debating society, or an association of musical amateurs, may incorporate themselves under our general laws, and establish various grades of officers, it can scarcely be urged that the court can be required to settle all their contested elections and appointments in this proceeding. There are grades of positions denominated offices which do not rise to the dignity of being entitled to the notice of the attorney-general by information."

42. **Same subject—Preliminary proceedings.**—When an officer has been elected and qualified, the authorities are in conflict as to what proceedings must precede a petition for quo warranto to remove him. In some states it is held that when the forfeiture has been caused by a criminal act there must be a conviction thereof by a jury before quo warranto can be brought; but in Royall v. Thomas,[45] the opposite is held. Forfeiture for cause other than crime, it is held, in Commonwealth v. Allen,[46] may be found by the court for itself in the quo warranto proceedings.

[44] 15 Mich. 161.
[45] 28 Grattan 130 (Va.).
[46] 70 Pa. 465.

It is now well established that, in proceedings by information to test the title to a public office, the return or certificate of canvassing officers as to the result of the election is not conclusive, as such officers are only ministerial officers with no judicial functions, and their return is but prima facie evidence in favor of the incumbent of the office. The courts, therefore, go behind such return and, if satisfied that it is erroneous, judgment of ouster will be given. The ballots, and not the canvass of those ballots, constitute the controlling evidence of election.

In re Strong,[47] and in State v. Lane,[48] it is held that in quo warranto the court "can only pass upon the question of the defendant's election, as quo warranto lies to remove the illegal incumbent of an office and not to put the legal officer in his place." But in Michigan, Nebraska, New York, Ohio, Wisconsin, Texas, California, Indiana, Kansas, and New Jersey, the remedy has been extended to determine the right of the petitioner to the office and seat him if necessary. And in Indiana, and perhaps also in Louisiana and Mississippi, if the petitioner fails to establish his title, the proceeding fails.

43. **Same subject—Federal and state officers.**—It is held in State v. Curtis,[49] that an information will not lie in a state court to try the right to office of a director in a national bank; and in State v. Bowen,[50] to determine the title of a presidential elector, though the power to appoint to the office is in the state, be-

[47] 37 Mass. 484.
[48] 16 R. I. 620.
[49] 35 Conn. 374.
[50] 8 S. C. 400.

cause his privileges are exercised under the laws of the United States. Although a petition for mandamus cannot be transferred, the Supreme Court holds, in Rosenbaum v. Bauer,[51] from a state to a federal court, yet when, under the laws of a state, an information in the nature of a quo warranto is regarded as an ordinary civil action, and is brought by the state in one of its own courts, to test the right of a foreign corporation to the exercise of corporate franchises within the state, it is removable to the Circuit Court of the United States.

44. **When relief must be in equity.**—Although a court of equity may hold the officers of a corporation accountable as trustees for their trust, it has no jurisdiction[52] in regard to the regularity of their election or removal, and it cannot divest corporations of their corporate character and capacity, since these are subjects of common law jurisdiction. And, on the other hand, since quo warranto only tests the right to an office or franchise, it affords no relief for official misconduct, or a breach of trust. Such relief should be sought in equity. Quo warranto may oust an incumbent of an office because of misconduct, if such misconduct operates as a forfeiture of the office; but if the title is not questioned, quo warranto cannot be used to restrain a public officer from doing any particular act, the right of doing which is an integral part of the rights of the office.

[51] 120 U. S. 450.

[52] Saltman v. Nesson, 201 Mass. 534.

CHAPTER VII.

HABEAS CORPUS.

45. **What is custody.**—Every restraint upon a man's liberty is an imprisonment, wherever the place or whatever the manner. Words may constitute an imprisonment[53] if they impose a restraint upon the man, and he submits. When a man submits without resistance to a sheriff, who has a writ in his hands for the arrest of the man, this is imprisonment, because if he attempts to resist the officer can summon bystanders to his assistance and may himself use personal violence. It is physical power which controls, though it is not called into action.

The writ, stating the time and cause of imprisonment, commands the respondent to have the body of the prisoner at a designated place and time, to do and receive what shall then and there be determined concerning the said prisoner and to "have then and there this writ." As the process under which the prisoner was held, is superseded by habeas corpus, the custody of the prisoner remains in the court issuing the writ. The custody being thus taken away from the sheriff, he is not responsible for the escape of the prisoner, while in custody of the court, and before a remand or other order is made placing new duties upon the sheriff.[54]

[53] Pike v. Hanson, 9 N. H. 491.

[54] Barth v. Clise, 12 Wall. 400 (U. S.).

46. **Jurisdiction of federal and state courts.**— Formerly many state courts exercised jurisdiction on habeas corpus to inquire into the lawfulness[55] of restraint under federal authority, though this jurisdiction often was denied by the federal courts. In 1858 the Supreme Court of the United States decided that if, upon application for habeas corpus, it does not appear in what custody the prisoner is held, a state court may issue the writ to inquire into the authority for the detention, but being apprised by the return that he is held under the federal authority, the jurisdiction is at an end;[56] and that if the application states that the prisoner is confined under the authority of the United States no state court can assume any jurisdiction, and all acts in pursuance of such assumed jurisdiction are void. Nevertheless in Sanborn v. Carleton,[57] when Sanborn was summoned to appear before the select committee of the Senate "to inquire into the facts attending the seizure of the armory of the United States at Harper's Ferry by a band of armed men," and he refused to appear, and the Senate, by resolution, directed the sergeant at arms "to take into his custody the body of said F. B. Sanborn wherever to be found, and to have the same forthwith before the bar of the Senate to answer for contempt of the authority of the Senate in thus failing and refusing to appear before said committee," and the sergeant gave the warrant to his deputy, who arrested Sanborn; and the latter brought a petition for habeas corpus; the Supreme

[55] Commonwealth v. Harrison, 11 Mass. 63.
[56] Re Tarble, 13 Wall. 397 (U. S.).
[57] 15 Gray 399 (Mass.).

Judicial Court of Massachusetts rules that the arrest was illegal and orders "said Sanborn be discharged from the custody of said Carleton."

Although no state court can make any further inquiry, after the return to habeas corpus that the person is in the custody of the United States, on the other hand, where one is imprisoned by a state authority in alleged violation of the Constitution, laws, or treaties, of the United States, the federal courts will inquire into the jurisdiction of the state court. The writ will issue in favor of persons imprisoned for contempt by a state court,[58] if the acts which constitute the contempt were done in the discharge of duties imposed by the laws of the United States. Where a person is in custody under process from a state court for an offense against the laws of such state, and the local statute under which he was indicted, is repugnant to the Federal Constitution, it is held the Circuit Court may discharge him, upon habeas corpus, in advance of his trial in the state court.[59]

47. **Same subject—Under the Revised Statutes.**—The jurisdiction of the federal courts to issue habeas corpus, as prescribed by the Revised Statutes, extends to five classes of cases: first, where a person is in custody under the authority of the United States; second, where he is in custody for an act done, or omitted, under a law of the United States, or under an order, process, or decree, of a federal court; third, where he is in custody in violation of the

[58] Electoral College's Case, 1 Hughes 571 (U. S.).
[59] Ex parte Royall, 117 U. S. 241.

Constitution, or of a law or treaty, of the United States; fourth, where, being a subject of a foreign state and domiciled therein, he is in custody for an act done, or omitted, under a right, privilege, or exemption, claimed under the sanction of any foreign state, the validity whereof depends upon the law of nations; and fifth, where it is necessary to bring him into court to testify. Unless the restraint comes within one of these classes, the federal courts have nothing to do with the matter.

Under the second class is the famous Neagle case.[60] Threats had been made by one Terry to take the life of Justice Field of the Supreme Court of the United States, and a deputy marshal, named Neagle, was delegated to protect the judge. Terry made an assault upon Justice Field, and thereupon Neagle shot and killed Terry. Neagle was arrested for murder by the State of California and applied to the Circuit Court of the United States for a writ of habeas corpus. The Supreme Court holds that, although the killing might be considered an offense against the state, yet since the deputy marshal was acting under the authority of the United States, the federal courts have jurisdiction to issue habeas corpus to inquire into the cause of his detention and discharge him, and that he cannot afterwards be tried in the state court. When, therefore, United States marshals, or their deputies, are arrested by state authority for using force in executing process of the federal courts, habeas corpus, the court says in United States v. Fullhart,[61] will effect their release; but this decision has

[60] 135 U. S. 1.
[61] 47 Fed. 802.

been questioned by the Supreme Court of Pennsylvania.

The third class was included in 1867, to protect emancipated negroes in their civil rights; but the rule is interpreted to give the federal courts power to reverse by habeas corpus the criminal judgments of the state courts, and to pass upon the validity of the police regulations, the criminal codes, and even the constitutions of the states. Such an interpretation is in direct contravention of all the previous decisions of the Supreme Court of the United States, and of the decisions of the English courts.

The fourth class was included in 1842, to meet the complications which grew out of the attack by British troops in 1837 upon the steamer Caroline, which was moored off the shore of New York in the Niagara river, after conveying munitions of war to Canadian insurgents on Navy Island. A member of this attacking force was arrested in New York and indicted for murder; the British government demanded his release, and the Supreme Court of New York refused to release him. A serious international complication might have followed but for the circumstance that, upon his trial under the indictment, he was acquitted. Now the federal courts may grant habeas corpus in all cases of aliens who are in custody for acts done under the authority of their government.

These provisions of the Revised Statutes apply to any custody whatsoever, whether by a state court, federal court, or a person acting outside of court. A Chinaman, detained on board a ship, under the Chi-

nese Restriction Act, by the master, or by the customs authorities, is in custody under the authority of the United States, and the federal courts may issue habeas corpus for his release.[62] Refusal to permit a Chinaman to land is a restraint of liberty, remediable by habeas corpus.[63] But the decision of the collector of customs, denying transit across the United States to a Chinaman possessing a through ticket to a point in foreign territory, cannot be reviewed by habeas corpus since, under the regulations authorized by the treaty with China, there is no provision for the review of this decision.[64] A person held in slavery by one of the tribes of Alaska is held in violation of the laws of the United States, and may be discharged by a federal court.[65] An Indian is a person within the meaning of the habeas corpus act and is entitled to habeas corpus in the federal courts[66] when deprived of his liberty under authority of the United States, or in violation of a law of the United States, or in violation of a treaty.

48. **Same subject—Legislative custody.**—The court has the power to inquire on habeas corpus into the lawfulness of imprisonments by order of the legislature;[67] "because, living under a written Constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine whether the powers of any branch of the government, and even those of the

[62] United States v. Chung Shee, 711 Fed. 277.
[63] U. S. v. Jung Ah Lung, 124 U. S. 621.
[64] Fok Yung Yo v. United States, 185 U. S. 296.
[65] Re Sah Quah, 31 Fed. 327.
[66] United States v. Crook, 5 Dillon 453 (U. S.).
[67] Burnham v. Morrissey, 14 Gray 226 (Mass.).

legislature, have been exercised in conformity with the Constitution; and if they have not been, to treat their acts as null and void." But in England, if it appears that the prisoner stands committed for a contempt adjudged against him by the House of Commons, the court before whom the matter is brought, cannot judge of the contempt, or bail the prisoner, but immediately must remand him. The writ will protect from arrest on civil process a witness before the legislature.[68] The supreme court may "inquire into the jurisdiction of a court martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence."[69]

49. **The return to the writ.**—The person to whom the writ is directed, whether by a state or a federal court, must make return thereto no matter by what authority, state or federal, he holds the prisoner.[70] "This right to inquire, by process of habeas corpus, and the duty of the officer to make return, grows necessarily out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers and each within its sphere of action, prescribed by the Constitution of the United States, independent of each."[71] But, although it is the duty of the marshal to make known by a proper return the authority under which he detains the prisoner, it is his duty also not to take

[68] Re Emery, 107 Mass. 172.
[69] Re Grimley, 137 U. S. 147.
[70] Bagnall v. Ableman, 4 Wis. 184.
[71] Shirk's case, 5 Phil. 333 (Pa.).

the prisoner before a state court,[72] because no state court, after being informed that the party is imprisoned under the authority of the United States, has any right to interfere with him or require the production of his body.

"Upon a return to a habeas corpus that the prisoner is detained under a sentence by a court having jurisdiction of the cause, the general rule is that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a course if the error be apparent and the imprisonment unjust the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error."[73] But when a court undertakes to punish a man for refusing to comply with an order which that court had no authority to make, the order is void, and the superior court will, by its writ of habeas corpus, discharge the prisoner.[74]

50. **Errors in sentence.**—If there is error in the sentence under which the prisoner is held, the remedy is by writ of error.[75] But if the want of jurisdiction appears on the face of the proceedings the prisoner will be discharged.[76] "When the proceedings are irregular or erroneous, if the court or magistrate has jurisdiction, the judgment is voidable

[72] Ableman v. Booth, 21 How. 506 (U. S.).
[73] Ex parte Siebold, 100 U. S. 371.
[74] Ex parte Fisk, 113 U. S. 713.
[75] Re Stalker, 167 Mass. 11.
[76] Herrick v. Smith, 1 Gray 12 (Mass.).

only, and not void, and, of course, must stand good until revised or annulled in a proper course of proceedings, by a court having authority to revise and annul it. But where it appears, on the face of the proceedings, that the magistrate had no jurisdiction, the proceedings are wholly void, the commitment is without authority, and the party committed is entitled to be discharged from his imprisonment without reversal of the judgment." Nevertheless in exceptional cases, relief may be granted by, and questions of constitutionality considered upon, habeas corpus.[77]

51. **Errors in commitment papers.**—If the papers are insufficient on their face to justify the arrest of a person the court will discharge him. "It is not open to the petitioner to call in question the correctness of the decision of the justice, as to the sufficiency of the evidence offered to sustain the complaint, or as to the legal effect to be given to evidence offered and relied upon in defense; or in other words, to show that, had there been a proper application of the law to his case, he would have been acquitted. But inasmuch as the right to hold the petitioner in present custody is justified under a mittimus, if this be an invalid warrant, no effect can be given to such an order, nor the party be held in custody."[78]

52. **When findings of fact conclusive.**—Since the administration by Congress of matters within its exclusive control is not cognizable by the courts,[79] then if Congress vests this function in administrative

[77] Re Bishop, 172 Mass. 35.
[78] Adams v. Vose, 1 Gray 51 (Mass.).
[79] Murray v. Hoboken, etc., Co., 18 How. 272 (U. S.).

officers, they may be the final judges of the facts upon which their decisions are based.[80] The admission of aliens is within the control of Congress and, therefore, the finding of facts on which the decision of their admissibility is based may be put exclusively into the hands of the administrative officers.[81] In United States v. Ju Toy,[82] Ju Toy was a passenger on a steamship returning from China to San Francisco, the immigration officers detained him as an alien, though he declared he was born in the United States and always had lived there, having gone to China only as a visitor. He procured a writ of habeas corpus from the district court which found, as a matter of fact, that Ju Toy was a citizen of the United States. But the Supreme Court, upon appeal, Mr. Justice Holmes writing the opinion, finds, as a matter of law, that it mattered not whether Ju Toy was a citizen of the United States or not; if the commissioner of immigration decided that he had not been born in the United States, and was not entitled to enter the country, there was no redress for Ju Toy. Justices Brewer, Peckham, and Day dissented, Mr. Justice Brewer writing a vigorous opinion.

53. **Suspension of the writ—By the President.**—Under Article I, § 9, of the Constitution, Congress can suspend the privilege of habeas corpus; but this section does not place such authority elsewhere. Early in the Civil War, President Lincoln authorized General Scott to suspend the writ at any point on the military line between Philadelphia and Washington.

[80] Public Clearing House v. Coyne, 194 U. S. 497.
[81] Fok Yung Yo v. U. S., 185 U. S. 296.
[82] 198 U. S. 253.

In 1861 John Merryman was held in Fort Henry, under order of Secretary Seward, on a charge of treason. An application[88] was made to the Supreme Court for habeas corpus, and Chief Justice Taney issued the writ, commanding General Cadwalader, who was in command of the fort, to produce Merryman before him; but the general refused to obey, and, when Chief Justice Taney issued an attachment, he shut the marshal out of the fort. The court says: "I can see no ground whatever for supposing that the President, in any emergency, can authorize the suspension of the privileges of the writ of habeas corpus or the arrest of a citizen, except in aid of the judicial power. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed in court and direct the clerk to transmit a copy to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation, 'to take care that the laws be faithfully executed,' to determine what measure he will take to cause the civil process of the United States to be recognized and respected and enforced." September 24, 1862, the President ordered that all persons discouraging enlistments, guilty of disloyal practices, or offering aid to the rebels, should be subject to trial by a military commission, and that habeas corpus should be suspended in respect to all such persons.

54. **Same subject—By Congress.**—Up to this time

[88] Ex parte Merryman, 9 Amer. L. Reg. 524.

Congress had not suspended the writ. March 3, 1863, Congress authorized the President, during the rebellion, to suspend habeas corpus in any case, throughout the United States, or any part thereof; and September 15, 1863, President Lincoln proclaimed a general suspension as to aiders or abettors of the enemy, and defined these to be those "who seek to exalt the motives and capacity of armed traitors, and to magnify their resources, or who inflame party spirit among ourselves and give to the enemy that moral support which is more valuable to them than regiments of soldiers or millions of dollars." August 13, 1864, Lambdin P. Milligan, a lawyer, delivered a political speech at Fort Wayne, in which he criticized Governor Morton of Indiana, a candidate for re-election. He was arrested, placed on trial before a military commission, found guilty, and sentenced to death. He petitioned for habeas corpus, and Justice Davis holds the commission had no jurisdiction to convict Milligan, saying, "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction; it is also confined to the locality of actual war." W. H. McCardle, the editor of a Vicksburg newspaper, was convicted by court martial on the charge that he had published articles to impede reconstruction. McCardle procured habeas corpus from the District Court. Upon the return General Ord sets forth that he held the prisoner under the Reconstruction Act, and the court dismissed the writ. McCardle appealed to the Supreme Court, which denied a motion to dismiss his appeal, and heard the case. Later, however, Congress

took away from the Supreme Court its jurisdiction in the McCardle case, and the appeal, therefore, was dismissed.

55. **Same subject—By the states.**—A few of the states, at very rare intervals, have suspended the writ. Massachusetts did so during Shay's rebellion, from November, 1786, to July, 1787. Neither the President nor Congress can suspend the issue of the writ by a state court. Suspension of the privilege of the writ does not suspend the writ itself. It issues as a matter of course, and on its return the court decides whether the applicant is denied the right of proceeding further.

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LAW OF HABEAS CORPUS

BY

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CHAPTER I.

DEFINITION, NATURE AND HISTORY OF THE WRIT.

1. **Definition.**—Habeas corpus is a process designed and employed to afford summary relief against illegal restraint of personal liberty. This definition embodies with epigrammatic brevity the entire substantive law of habeas corpus. Were it not for the necessity of defining the word "illegal," we could drop this branch of the subject and take up the rules governing the procedure, which constitute the adjective law.

Substantive law is the law of rights which the courts are called on to administer, as distinguished from the rules of procedure, or method by which a determination of rights is reached. These rules of procedure are called adjective law. Thus, the law which determines the rights of the parties to a contract is substantive law; while, if suit be brought for an alleged breach of the contract, the rules which govern the mode of reaching the issue (the plead-

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ings), the selection of a jury, the production and examination of witnesses, the arguments, the charge of the court, the verdict, etc.,—in other words, the rules adopted to secure orderly procedure in the administration of justice,—are adjective law.[1]

2. **Nature of the writ.**—Habeas corpus is one of the four great prerogative writs which we owe to the jurisprudence of England.[2] It was called a prerogative writ because it was a part of the king's prerogative to protect his subjects in the enjoyment of their civil rights, and in fact and in form the proceeding was instituted and prosecuted in the name of the king for the purpose of effecting a restoration to the subject of that greatest of all civil rights, the right of personal liberty, of which he had been unlawfully deprived. The object of the writ being to effect the restoration of a civil right and not to punish an offender, it is a civil, as distinguished from a criminal, proceeding,[3] the latter being, as to its object, punitive. It is called an extraordinary writ,—extraordinary because it is a remedy which supersedes the ordinary methods of judicial procedure,—trial by jury, formal sitting of court in term, etc. The proceedings are always summary, drastic, and, to a certain extent, informal. It is also called a writ of right. Originally, the writ could only be obtained of the king's grace; but since the day of the king's guarantee contained in Magna Charta, that no man should be im-

[1] Bouvier's Law Dictionary, title Law.

[2] The other three prerogative writs are Mandamus, Quo Warranto, and Prohibition. Habeas corpus literally translated is "that you have the body."

[3] Ex parte Tom Tong, 108 U. S. 556.

prisoned but by the lawful judgment of his peers, or by the law of the land, reinforced by acts of Parliament, and in this country declared by constitutional provisions and legislative enactments, it has been a writ of right; that is, the subject has the absolute right, on a showing that he is illegally confined, to apply for and obtain the writ and thereupon to have the legality of his confinement determined. Nevertheless the writ, to this day, retains its prerogative character as being a proceeding by the king, or by the United States, or by the state, on behalf of the subject.[4]

3. **Different forms of habeas corpus.**—All that has been said in the preceding sections applies solely to the writ whose definition is above given, which is technically called *habeas corpus ad subjiciendum et recipiendum* (that you have the body to submit to and receive). In early days there were several other processes which were used for other purposes than to relieve from illegal restraint, all of which were termed habeas corpus, because that was their mandate. Thus, there was *habeas corpus ad respondendum* (that you have the body to answer), *habeas corpus ad satisfaciendum* (that you have the body to make satisfaction), *habeas corpus ad testificandum* (that you have the body to testify), and also some others, the purposes of which are clearly indicated by their names. These, however, have now all completely fallen into disuse with the single exception of *habeas corpus ad testificandum,* which is still sometimes used in this country to compel a prison

[4] The People v. Bradley, 60 Ill. 390.

warden to produce in court the body of a prisoner in order that he may testify. The object of this article is to treat only that form of habeas corpus known as *ad subjiciendum et recipiendum,* the sole use of which was (and is) to determine the legality of a restraint of personal liberty.

4. **History.**—The origin of the writ of habeas corpus is unknown. Traces of it are found in the reign of Edward III. In its early days it was used only as a means of freeing from private restraint. But from the date of Magna Charta, A. D. 1215, it became the recognized mode of relief from any illegal restraint. However, in the reign of Charles I, subservient judges denied the writ to those who were imprisoned by order of the king or of the Privy Council, and this led to the passage by Parliament of two famous statutes regulating the practice and declaring the right to the writ.[5] The latter statute is called the Habeas Corpus Act. This statute has been substantially re-enacted in the various states of this country. The American colonies claimed that this writ was part of their birthright and one of the grievances recited in the Declaration of Independence was that Canada was denied the benefit of it.[6]

[5] 16 Car. I, chap. 10; 31 Car. II, chap. 2.

[6] Pollock and Maitland, History of the English Law, pp. 584, 591; Bouvier's Law Dictionary, title Habeas Corpus.

CHAPTER II.

THE RIGHT OF PERSONAL LIBERTY AND ITS LIMITATIONS.

5. **Limitations on the right of personal liberty.**—It is self-evident that under a variety of circumstances a human being may lawfully be forced to surrender his personal liberty and that the writ of habeas corpus is unavailing in such cases. As the right to the writ only arises in the case of illegal restraint we must inquire under what circumstances imprisonment is illegal. The motives, the objects, and the means of effecting illegal imprisonment are, however, infinite in number, while the law has undertaken to define and limit legal imprisonment with extreme exactness. The logical course, then, will be to determine under what circumstances imprisonment is legal. It will necessarily follow that any other imprisonment will be illegal.

6. **Same subject.**—These legal limitations are in their nature either public or private.[7]

Public limitations on the right to personal liberty are:

1. Punitive of crime.
2. Coercive of duties to the state.
3. Executive of duties to the citizen.

Private limitations on the right are:

1. Coercive of private obligation.

[7] This classification is taken from Hurd, Habeas Corpus, p. 5.

2. Incident to certain civil relations, which are:
   - *a.* Husband and wife.
   - *b.* Parent and child.
   - *c.* Guardian and ward.
   - *d.* Master and apprentice.
   - *e.* Master and servant.
   - *f.* Master and scholar.
   - *g.* Principal and special bail.

In no case can an imprisonment be legal unless it can be shown to fall within the above classification, and even so, so jealous is the law of the right to personal liberty, if the one responsible for the imprisonment exceed the well-defined limits of the authority given him by the law, he will render the restraint illegal and the writ of habeas corpus will be the effectual means of relieving the victim.

7. **Limitations punitive of crime.**—The existence and continuance of the social order necessitate the right of the state (and this generic name includes the United States or any organized government) to try persons charged with the commission of crime and to punish by imprisonment, if found guilty. The right to try includes the right to compel the presence of the accused at and during the trial, which in turn may include the right to hold the accused in confinement until the time of trial. But the right of the state in this regard has been carefully limited in this country by constitutional provisions which are collectively known as the Bill of Rights, and which were adopted in order to prevent an oppressive use of power on the part of the state.[8] The constitutional

[8] 2 Kent's Commentaries, lecture XXIV.

guaranties of personal liberty will be particularly considered further on. Any restraint, under color of public authority, which is in violation of any of these guaranties, is illegal, and habeas corpus will give relief. Not only so, but the process under which a man accused of crime is arrested must be issued by one to whom the authority has been given by law, and the court to which he is held for trial must have jurisdiction given to it by law to try for the particular crime charged, and having undertaken to exercise its jurisdiction must not exceed it. Any usurpation of jurisdiction at once renders the detention of the prisoner illegal.[9]

8. **Limitations coercive of duties to the state.**— The citizen may be compelled to perform all the duties which he owes to the state. The coercion used may take the form of imprisonment and in many cases the mere performance of the duty in itself involves a restraint of personal liberty. Thus, the payment of taxes may be coerced by imprisonment. A man who is responsible for the conception of an illegitimate child owes a duty to the state to prevent the child from becoming a public charge. The performance of the duty may be coerced by imprisonment, the man being given the alternative of giving security for the support of the child, or of going to jail until he does. The personal services which a man, as a citizen, must give to the state, in themselves involve a surrender to some extent of personal liberty and constitute imprisonment; but in all of the foregoing cases the imprisonment is legal.

[9] Church, Habeas Corpus, § 368.

The citizen must surrender his liberty to the extent necessary for service as a public official, a witness, a juror, a soldier, a member of a sheriff's posse, or the like.[10]

9. **Limitations executive of duties to the citizen.**— As between the state and its citizens the duties are not all on one side. The state, in recognition of the duty which it owes to the members of certain unfortunate classes, has established poor-houses, orphanages, insane retreats, and hospitals. Not only does the state owe this duty to its paupers, its orphans, its insane, and those afflicted with contagious diseases, but it owes to the general public the duty of protecting it against the evils which would probably result from allowing these unfortunates to be at large.[11] Obviously the execution of this twofold duty entails a restraint of liberty. But in all such cases the legality of the detention ceases when the duty is at an end. Thus, a person who has a contagious disease may be isolated. But the moment he is cured, his right to liberty is restored and his further detention is illegal. And inasmuch as a man in confinement has, at any moment, the right to have the legality of his detention judicially passed upon, one who has been isolated as a leper, or one who has been committed to an insane retreat, may at any time, and

[10] Robinson, Elementary Law (revised), § 41. There exists a popular delusion that a man is under no legal compulsion to accept public office. A man has no more right to decline what is generally understood by the term "office" than he has to refuse to obey a lawfully-made call to serve as a juror. Neither has an officeholder the right to resign. On account of an obvious defect in the social order, the legal proposition has become, and for some time must remain, a purely abstract one.

[11] Dwight, Law of Persons and Property, pp. 103-116.

repeatedly, sue out a writ of habeas corpus and thereby secure a judicial determination as to whether the former state, which made the original detention lawful, still exists.[12]

10. **Limitations coercive of private obligation.**—Little is left in this country of the old notion that a judgment debtor who refuses or is unable to pay the judgment should be persuaded to pay by lodging him in jail until he does. Nevertheless, there are states which still allow imprisonment for judgment debt founded on certain causes of action; also there are states in which, when a suit is brought based upon breach of promise of marriage, or fraud, instead of the defendant being simply served with a summons to appear and defend, he is arrested on a writ which is called a *capias ad respondendum* (that you take the body of the defendant and hold him to answer the plaintiff) and he is held in custody until he gives a bond for his appearance. The rules for determining the legality of detention under color of civil process are the same as in criminal cases. As long as the court does not exceed the authority given to it by law, there is nothing to do but to submit; but let that authority be exceeded, and habeas corpus will be as effectual a remedy as it would be in a criminal case.[13]

11. **Limitations incident to the relation of husband and wife.**—In old times a man had a practically unlimited right to restrain his wife. She was little better than a chattel. But in its modern develop-

[12] The Thaw case in New York, the recollection of which cannot yet have faded from the mind of the reader, is a fair example of this proposition.

[13] Hecker v. Jarret, 3 Binney 404 (Pa.).

ment, the law has restricted this right to such reasonable confinement as is necessary to prevent her from committing deeds of violence, or to protect his honor. The necessity must in fact exist and the extent of the restraint must be reasonable. If the husband exceed his authority in either of these respects, the restraint is illegal and the wife may be released on habeas corpus.[14]

12. **Limitations incident to the relation of parent and child.**—Obviously, the duty which a parent owes to the child would be impossible of performance without the right to restrain the child's liberty. The child may be forced to live at home or at school, though even this amount of restraint would be intolerable if practiced upon one who was his own master. This right to custody includes the right of punishment, which in all cases must be reasonable in view of the seriousness of the disobedience and the health and strength of the child. Any confinement which exceeds the bounds of reason becomes unlawful and the child may be released on habeas corpus. Parents may forfeit their right to the custody of their own children by cruelty or gross immorality. In such case, the further custody by parents becomes illegal and any friend, or even an incorporated benevolent society, may sue out a writ of habeas corpus which will bring the child into court, where the forfeiture of the parents' right will be declared and proceedings may then be had for the appointment of a guardian. The right of the parent to the custody of the child may be enforced by habeas corpus as against

[14] Church, Habeas Corpus, §§ 421, 422.

any person who unlawfully usurps the parental right. The right of the parent ceases when the child becomes twenty-one years of age, unless the child is a lunatic; and even then the continuance of the right to custody is subject to the right of the state to take charge of the unfortunate. The latter is a paramount right.[15]

13. **Limitations incident to the relation of guardian and ward.**—The guardian of either an infant or a lunatic has a right of restraint over the ward similar to, but not as extensive as, that of the parent over his child. For the exact delimitation of this right the reader must be referred to the title Guardian and Ward in Volume VI of this series. To the extent of the right the writ of habeas corpus is as available as in the case of parent and child.

14. **Limitations incident to the relation of master and apprentice.**—A minor may be indentured to a master to learn a trade. The relation must be created by deed. The master acquires a right to the services and custody of the minor. This relation is in most of the states carefully regulated by statute. The authority of the master is derived from the parent or guardian and is limited by the terms of the deed and by the statute. Within these combined limits, the master is entitled to the custody of the apprentice and may have habeas corpus to recover such custody from one who detains the apprentice from him; but if the character of his own custody exceeds the terms of either the deed or the statute, the apprentice may be taken from him by the same means.[16]

[15] Hurd, Habeas Corpus, p. 40.

[16] 1 Bouvier's Law Dictionary, title Apprenticeship. The reader is also referred to the statute of his own state on this subject.

15. **Limitations incident to the relation of master and servant.**—When this relation, otherwise than as an apprenticeship, exists, the right of restraint is, in this country, restricted to children under the age of discretion who have been entrusted to a master with power delegated by the parents; and to pauper children under the age of discretion, without parents or guardians, to whom the benefits of a home have been given. The Constitution of the United States declares that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States or in any place subject to their jurisdiction."[17] If a man contract to serve another, he will render himself liable to a suit for damages if he break the contract. But if he choose to break the contract, to restrain his liberty in order to compel performance would be to subject him to involuntary servitude and the United States court would release him on habeas corpus.[18]

16. **Limitations incident to the relation of master and scholar.**—Whatever authority a master has to restrain the liberty of a scholar is derived from the parent or guardian. It is limited to the authority that the parent or guardian had to delegate. Although the master cannot exceed the authority delegated to him without rendering himself liable in damages, it is useless to inquire whether an abuse of

[17] Thirteenth Amendment.

[18] Seamen, as well as minors, were not within the protection of the Thirteenth Amendment until the year 1898 when Congress passed an act making it unlawful to coerce a seaman by means of imprisonment to work out his contract. The South Portland, 111 Fed. 767.

authority would cause him to respond to a writ of habeas corpus, because the parent or guardian may revoke the authority at any moment. The master can never legally detain the scholar as against the parent or guardian. If, however, the scholar were kidnapped, the master could recover his custody by means of habeas corpus.[19]

17. **Limitations incident to the relation of principal and special bail.**—When one accused of crime is admitted to bail he is obliged to give a bond conditioned on his appearance in court on a certain day. The bond must be executed by the accused and a surety, and they are called, respectively, the "principal" and the "special bail." The peculiarity about the relation thus established is that the special bail has, at any time before the condition of the bond becomes due, the right to take the principal into custody and surrender him to the authorities and thereby relieve himself of liability. It follows that the principal has no right to a writ of habeas corpus to be released from the custody of the special bail who has arrested him for this purpose.[20] Furthermore, the bail has the right to follow the principal into another state and arrest him there. And no judicial process is required to authorize such arrest.[21]

[19] Commonwealth v. Downes, 24 Pick. 227 (Mass.).
[20] Read v. Case, 4 Conn. 166.
[21] Nicolls v. Ingersoll, 7 Johns. 145 (N. Y.).

CHAPTER III.

ISSUANCE OF THE WRIT—PROCEDURE.

18. **What constitutes a restraint.**—The unlawful restraint from which habeas corpus will relieve must be actual. Commands may constitute an actual restraint if accompanied by a present intention and apparent ability to enforce them and the party submits.[22] But a present constraint to submit to future restraint is not enough. Thus, a man who is out on bail cannot have habeas corpus, no matter how illegal his original arrest was and how illegal his detention would be if he had not given bail.[23] To obtain the writ in such a case, he must surrender himself to the authorities. Being then in actual detention, he may sue out the writ to determine the legality of the restraint.[24]

19. **Imprisonment under unconstitutional statute.**—There can be no crime except in violation of law. There can be no law in contravention of either the state or the Federal Constitution. No court has jurisdiction to punish a man who has not violated the law. Therefore a man who is in custody, charged with the violation of an unconstitutional statute, is entitled on habeas corpus to an unconditional discharge, and this whether before or after convic-

[22] Commonwealth v. Ridgeway, 2 Ashmead 247 (Pa.).
[23] In re Dykes, 13 Okla. 339, 74 Pac. 506.
[24] In re Gow, 139 Cal. 242, 73 Pac. 145.

tion.[25] Such a state statute is a violation of the provision of the Fourteenth Amendment that "no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."[26] Of course, the constitutionality of the statute is a question for the court or judge before whom the writ of habeas corpus is returnable to decide.

20. **Imprisonment under void city ordinance.**—The power of a city to regulate affairs within its borders by ordinance and to punish violations by fine and imprisonment is strictly limited by its charter. An ordinance in excess of the charter power is void. Upon the same reasoning set out in the previous section, one who is arrested for the violation of a void city ordinance is deprived of his liberty without due process of law, and may obtain release by habeas corpus.[27]

21. **Imprisonment in violation of constitutional guaranties.**—Every accused person has a constitutional right to a speedy trial. If a man be held in jail for an unreasonable time awaiting trial, his imprisonment becomes illegal, and he may resort to habeas corpus. So, in general, if a man be held to await the action of the grand jury and, upon meeting, that body fully considers his case and fails to find a true bill, he is entitled to a release. In such a case, however, a release on habeas corpus would not preclude an indictment by a subsequent grand jury, for the re-

[25] Ex parte Siebold, 100 U. S. 371.
[26] Yick Wo v. Hopkins, 118 U. S. 356.
[27] Stockton Laundry Case, 26 Fed. 611.

lease will not wipe out the offense.[28] Another constitutional right is that of an accused to be admitted to bail where the offense charged is bailable. If a man be denied bail in violation of this right, his detention is illegal, and he may have habeas corpus to enforce the right.[29] The judge before whom the writ is returnable will admit him to bail. The same remedy may be resorted to where excessive bail is required.[30] Another such right is that guaranteed by state constitutions that every accused shall be admitted to bail except in capital cases where the proof is evident or the presumption great. But in every case of the violation of the foregoing rights, resort must be had to habeas corpus while the right is being violated. As soon as the accused is brought to trial the right ceases to be violated and the illegality of the detention ceases.[31] The Fifth Amendment to the Federal Constitution says that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury." So, where a man was indicted, and the indictment was altered without being re-submitted to the grand jury, and he was tried and convicted, he was released on habeas corpus because the document containing the charge on which he was tried did not come within the definition of an indictment.[32]

22. **Lack or excess of jurisdiction and mere error.** —There is no escape from the proposition that if

[28] Walker v. Martin, 43 Ill. 508.
[29] People v. Town, 3 Scam. 19 (Ill.).
[30] Jones v. Kelly, 17 Mass. 116.
[31] In re Riley, 2 Pick. 172 (Mass.).
[32] Ex parte Bridges, 2 Woods 428 (U. S.); Ex parte Bain, 121 U. S. 1.

a man is detained as a result of a court having acted without jurisdiction, or of a court having exceeded its jurisdiction, his detention is illegal. Thus, a justice of the peace might issue a warrant for the arrest of a man on the charge of murder. Assuming a proper complaint to have been made, the arrest would be legal. But suppose the justice, having the prisoner before him, were to pretend to try him for the crime, and, finding him guilty, were to sentence him, —the detention, from the very moment of the unlawful assertion of jurisdiction, would entitle the victim to release upon habeas corpus.[33] On the other hand, a detention resulting from what we call "mere error" is not illegal. The distinction is a very difficult one to explain. Excess of jurisdiction is a fundamental defect which is fatal—which renders all proceedings void from that point on. Mere error has no effect on jurisdiction and does not render illegal a detention which was before legal. A mere irregularity or error is the want of adherence to some prescribed rule or mode of proceeding, and it consists in omitting to do something that is necessary to the orderly conduct of a suit, or the doing of it at an unreasonable time, or in an improper manner.[34] The only effect of it is to render the proceedings voidable—that is to say, liable to be set aside on an appellate proceeding known as writ of error. But unless and until a judgment or sentence is so set aside, if it is based upon mere error, it is perfectly valid and binding and must be so treated by the courts, and therefore an

[33] Miller v. Snyder, 6 Ind. 1.
[34] 1 Tidd's Practice, p. 434.

imprisonment under it could not be relieved against by habeas corpus. On the other hand, a fatal defect is one that is repugnant to the principles of law as distinguished from the mere rules of procedure.[35] A judgment based upon such a defect is void—it is not a judgment at all—no one is bound to recognize it or submit to it, and imprisonment under it is illegal, and habeas corpus will relieve from it. If a man be on trial for a felony before a court of competent jurisdiction, any errors of the judge in admitting or rejecting evidence,[36] or in charging the jury,[37] would not affect the validity of the verdict or of the sentence so long as it remained unreversed. But if the judge were to assume to try the case without a jury, a constituent part of the court would be lacking—there would be no court; the judge would be acting without jurisdiction, and his sentence would be void.[38]

23. **Particular examples of legal and illegal detention.**—In general, it may be said that the mere fact that a man has been sentenced to imprisonment in the wrong place will not entitle him to release on habeas corpus. But if the court which sentenced him sat in a place not provided by law, the sentence would be void.[39] Where the sentence is in excess of that allowed by law, it is valid to the extent of the power, but void as to the excess. In such a case, the prisoner must serve the maximum time allowed by law and then he may have habeas corpus.[40] A sen-

[35] Ex parte Gibson, 31 Cal. 619.
[36] Turney v. Barr, 75 Iowa 758.
[37] Church, Habeas Corpus, § 363.
[38] Bouvier's Law Dictionary, title Jury.
[39] Ex parte Jones, 49 Ark. 110.
[40] Ex parte Mooney, 26 W. Va. 36.

tence based on a conviction which was not warranted by the evidence, or was contrary to the charge of the court, is mere error.[41] But a judgment not based on a conviction is void.[42] Error in overruling a special plea and obliging a prisoner to go to trial on the merits is mere error.[43] The same is true of a denial of compulsory process for the prisoner's witnesses.[44] A man has a constitutional right not to be tried twice for the same offense; but the fact of former jeopardy must be set up in defense on the second trial and can not be made the basis of habeas corpus.[45] On the other hand, as an executive pardon wipes out all liability to punishment, if a convicted man be pardoned and then reindicted, habeas corpus will release him.[46] If an examining magistrate commit a man for trial or to await the action of the grand jury when there is no probable cause, the detention is illegal.[47]

24. **Who may apply for the writ.**—Bearing in mind that the writ will relieve from any illegal imprisonment whether without or under color of process, civil or criminal, it goes without saying that the one who is entitled to the relief is the logical one to apply for it. And yet, the very nature of the wrong will sometimes make it impossible for the victim of an illegal detention to apply himself, and the application need not come directly from him or be ex-

[41] In re Thompson, 9 Mont. 381.
[42] Ex parte Garvey, 7 Colo. 384.
[43] Ex parte Snyder, 29 Mo. App. 256.
[44] Ex parte Harding, 120 U. S. 782.
[45] Ex parte Maxwell, 11 Nev. 428.
[46] State v. Stalmaker, 2 Brev. 1 (S. C.).
[47] In re Balcolm, 12 Neb. 316, 11 N. W. 312.

pressly authorized by him. It may be made by a friend on behalf of the prisoner.[48] A wife may apply on behalf of her husband;[49] a husband on behalf of his wife;[50] and it is not necessary that the applicant sustain any legal relation to the prisoner. Anyone may apply who can show good reason why the prisoner cannot apply for himself.[51] Furthermore, the writ can be made to serve the double use of freeing from illegal restraint and of recovering a legal custody by one entitled thereto. By this means a parent can secure the custody of his minor child;[52] a guardian, the custody of his ward;[53] a master, the custody of his apprentice;[54] a special bail, the custody of his principal.[55]

25. **Application for the writ.**—The judges having authority to grant the writ are always designated by the Constitution or by statute. In Illinois, the writ may be issued by the supreme court, by the circuit courts in term time, and by the judges thereof in vacation, and by masters in chancery in their respective counties when the judge is absent from the county.[56] The judges of the United States District Courts can grant the writ only in cases where the detention is in violation of the laws of the United States.[57] Appli-

[48] 14 Howard's Eng. State Trials, 814.

[49] In re Ferrens, 3 Benedict 442 (U. S.).

[50] Anne Gregory's Case, 4 Burrows (K. B.) 1991 (Eng.).

[51] The Hottentot Venus Case, 13 East. 195 (Eng.). In this English case, the application was made by a benevolent society on the allegation that the prisoner was too ignorant to know that she had a right to her liberty.

[52] People v. Mercein, 3 Hill 399 (N. Y.).

[53] Commonwealth v. Downes, 24 Pick. 227 (Mass.).

[54] People v. Pillow, 1 Sandf. 672 (N. Y.).

[55] Anonymous, 1 Penn. 284 (N. J.).

[56] Hurd's Revised Statutes (1911), p. 668, § 8; p. 678, § 63; p. 1517, § 6.

[57] U. S. Rev. Stats., § 733.

cation must be made by petition, which must not simply aver an illegal detention, but must set forth the facts out of which the detention grew. These facts must show that as matter of law the detention is illegal, and for the purpose of obtaining the writ, the averments of the petition are taken as true. The petition must make out a prima facie case of illegal confinement. Thus, if the writ is asked on the ground that the prisoner has been held without probable cause to await the action of the grand jury, the petition must set forth the evidence taken by the committing magistrate.[58] If the facts set forth in the petition show the confinement to be legal, the writ will be refused.[59] But if the facts make out a prima facie case, the judge has no discretion—he must grant the writ.[60] The petition must be verified.[61]

26. **The writ.**—Whether the judge, upon granting the writ, signs it himself or orders it to issue from the clerk's office, depends upon local practice. No federal judge has any authority to sign process of any kind. The writ is a precept directed to the one alleged to be guilty of the illegal restraint (who is called the respondent), requiring him to produce the body of his prisoner in court or before the judge at a time named, or forthwith to submit to and receive what the court shall order, and to have with him the cause of the detention (his return).[62] The writ hav-

[58] In re Klepper, 26 Ill. 532.

[59] Ex parte Watkins, 3 Pet. 193 (U. S.).

[60] Ex parte Wilson, 40 Fed. 66.

[61] For forms of petition upon various grounds, and the verification, see Puterbaugh's Pleading and Practice at Law (6th ed.), p. 719.

[62] A general form of a writ of habeas corpus will be found in Puterbaugh's Pleading and Practice at Law (6th ed.), p. 724.

ing been served on the respondent, he should yield prompt obedience to the precept so far as it is possible for him to do so. If it is impossible for him to produce the prisoner, either because he is not detaining him, or because the prisoner is too ill to be moved, or for any other cause, he is still bound to make return.

27. **The respondent's return.**—Whether the respondent have the custody of the prisoner or not, and if he have, whether legally or illegally, he must answer the writ at the time named (although the judge, in his discretion, may extend the time). This answer is technically called "the respondent's return." The answer must be in writing, verified. If the respondent claim that he has no control over the petitioner, he must so answer. But if the petitioner is in his control, he must produce him and the return must set out the cause of the detention. The respondent may admit the facts set out in the petition and submit to the court the question whether or not these facts constitute a legal ground of restraint. Or, he may take the ground that the petitioner has not told the true facts, or all of them, and give his own version of the cause of the detention. If the respondent has the petitioner in custody, but cannot produce him by reason of illness, or, as said above, for any cause whatever, he must give the excuse along with the cause of the detention.[63]

28. **The hearing.**—There can be no hearing on the merits of the writ unless the prisoner is physically

[63] For various forms of return, see Puterbaugh's Pleading and Practice at Law (6th ed.), p. 726.

before the court.[64] Therefore if, between the suing out of the writ and the return, the prisoner has escaped and is still at large, the writ will be dismissed. If the prisoner is before the court and the return admits the facts stated in the petition, the court decides the point of law. If the facts in the return vary from the petition, the petitioner may admit them, and again there is only a question of law to be determined. Or, the petitioner may controvert the truth of the return (traverse it), and this will raise an issue of fact to be determined by evidence without a jury. If the issue, whether of law or of fact, be determined in favor of the prisoner, he is given his liberty; if against him, he is remanded to the custody of the respondent.

29. **Obedience to the writ.**—This is enforced by contempt proceedings. But in this the court will be guided by the circumstances of each case. First, the court must have evidence that the writ has been served on the respondent. If the writ has been served and the respondent makes return refusing to produce the prisoner, and gives no valid excuse, this is a contempt which will cause an immediate arrest of the respondent and his commitment to jail until he purges himself of the contempt. But under ordinary circumstances, the mere failure of the respondent to make a return at the time named in the writ will not subject him to arrest. The court will generally give him another chance by issuing against him a rule to show cause why he should not be attached for contempt for failure to make a return. If, after serv-

[64] Board of Supervisors v. Leigh, 69 Miss. 754, 13 So. 854.

ice and return of the rule, the respondent fails to make return, he is then punished.[65]

30. **Suspension of the writ.**—The Constitution of the United States declares that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."[66] The same provision has been incorporated in the constitutions of most of the states, although a few of the state constitutions forbid the suspension of the writ under any circumstances. By authority of Congress, President Lincoln suspended the writ in 1863, and the suspension was effective during the remainder of the rebellion. The writ has several times been suspended in the individual states, notably in Massachusetts at the time of the Shay rebellion, in Rhode Island at the time of the Dorr rebellion, in Shoshone County, Idaho, at the time of the insurrection in 1899, and lately in the coal region of West Virginia, in which martial law was declared.[67] The better opinion seems to be that the power to suspend the writ lies in the legislature and not in the executive.[68]

BIBLIOGRAPHY.

The latest and most complete work on our subject is *Bailey* on Habeas Corpus; but as the law of habeas corpus is simply the law of personal liberty, which involves all the branches of law that are classified in § 6, p. 633, it will be better in a given case not to confine one's investigations to a monograph on habeas

[65] Church, Habeas Corpus, § 137.

[66] Art. I, § 9.

[67] State ex rel. Mays v. Brown, 77 S. E. 243 (W. Va.).

[68] Ex parte Merryman, Taney 246 (U. S.), 17 Fed. Cas. 144; 3 Story, Constitution, § 1336.

corpus but to consult an authority on that branch of the law within which the supposed illegality would fall. Thus, if the validity of judicial process is concerned, consult *Freeman* on Judgments, *Bishop's* Criminal Law, *Bishop's* New Criminal Procedure and *Tidd's* Practice. If a question of constitutional right or privilege is involved, consult *Story* on the Constitution or *Cooley's* Constitutional Limitations. In a case involving the validity of a city ordinance, there is nothing better than *Dillon* on Municipal Corporations. Where the question concerns the domestic relations, there are *Schouler* on Domestic Relations and *Peck* on Domestic Relations. For the procedure, consult any of the works on habeas corpus, among which none are better than *Bailey, Hurd,* and *Church,* or *Puterbaugh's* Pleading and Practice at Common Law, after first familiarizing yourself with the statutory provisions in your state on the subject.

QUIZ QUESTIONS

PLEADINGS IN CIVIL ACTIONS—AT COMMON LAW AND UNDER MODERN STATUTES

(The numbers refer to the numbered sections in the text.)

1. (a) Of what do the pleadings consist? (b) How many pleadings are permitted in forming an issue: (1) at common law; (2) under the code?
2. (a) Why are pleadings necessary? (b) What would be the result of attempting to conduct trials without pleadings?
3. State what you know of the difficulty in devising satisfactory rules of pleadings?
4. What is the result of careless pleading?
5. What is the result of lax rules of pleading and carelessness in following such rules?
6. (a) Name the constituent parts of a court. (b) Do all courts consist of the same factors? (c) Name the factors essential to the smallest court. (d) Name the factors constituting the largest court with which you are acquainted.
7. (a) Are all systems of pleading uniform? (b) Is one system of pleading always used in all of the courts of the same country? (c) State what you know of English pleading and of the systems used.
8. (a) Where were the common law rules of pleading originally used? (b) Where and to what extent are they followed now? (c) Where are they still in full force? (d) Why should these common law rules be studied?
9. (a) What were original writs? (b) How did the parties at the earliest period of common law pleading declare their

causes of action and defense? (c) What were the use and effect of the original writ?

10. (a) What can you say about the choice of writ? (b) What was the result of choosing the wrong writ? (c) Why was the wrong writ sometimes chosen?
11. (a) Define an action at law. (b) Correctly speaking, what is a suit? (c) Is the distinction between actions and suits always recognized in speaking of them?
12. (a) How many classes of actions are there? (b) Name them. (c) Name the purposes for which each of these actions, severally, was used. (d) Into how many classes, naming them, were personal actions divided?
13. (a) What preparation is necessary for a student to be able to prepare pleadings in any particular state? (b) What must a lawyer do to prepare himself for drawing pleadings to use in another state than the one in which he is practicing?
14. (a) How may students obtain a practical understanding of the subject of pleading? (b) How may the student approach the subject of pleading to best advantage?
15. (a) Name some of the early English courts of limited jurisdiction. (b) Name the courts established in England by William the Conqueror. (c) What can you say of these last named courts? (d) What can you say of their jurisdiction? (e) Name the common law courts of England. (f) What was the court of chancery, and what was its purpose and jurisdiction?
16. (a) State what you can of the chancellor's powers. (b) What did he or his court have to do with the commencement of a common law action? (c) What did he do toward granting relief in his own court? (d) What was an ecclesiastical court, and what was its jurisdiction?
17. (a) What is the most common trial court of general jurisdiction in the United States? (b) State generally what is the jurisdiction of courts of this kind. (c) What can you say about the practice of law and equity in these courts? (d) What other courts of original jurisdiction are named in § 17?
18. (a) At early common law what must be done as preliminary to bringing an action at law? (b) What can you say

about the number and kinds of early common law actions? (c) For what did these actions provide remedies? (d) What was done to remedy the condition which was developed?

19. (a) What effect did the nature of the original writ have upon the action? (b) What was the result of choosing the wrong writ? (c) Are original writs still used? (d) What was the effect of the original writ upon the modern actions? (e) Why should a lawyer use known legal expressions in pleading, when available and applicable?
20. (a) What can you say about the development of abuses in pleading and their correction by statutes? (b) When was the first correcting statute passed?
21. (a) What is the first knowledge an attorney must seek when contemplating the bringing of an action? (b) Name the other matters with which he should acquaint himself before bringing the action. (c) What is the name of the plaintiff's first pleading?
22. (a) What must the plaintiff's attorney determine in relation to the parties before commencing an action? (b) How does a plaintiff bring the defendant into court to defend an action? (c) Can an action be prosecuted without notice to the defendant to appear in court? If so, when? (d) What will the plaintiff do if not all of the defendants can be legally served with notice? (e) Can the defendant in a civil action ever be arrested? If so, when?
23. (a) What should the attorney do in drawing his first pleading: (1) in a state using the common law rules of pleading; (2) in a state which has a statutory code of procedure? (b) What evidence should he keep in mind when he prepares this pleading? (c) What should an attorney keep in mind in preparing a plea for the defendant? (d) How should a plea of denial be prepared? (e) What can you say regarding new matter in a defendant's pleading?
24. (a) Where a right of defense is composed of several parts, how should the plea be prepared? (b) What will be the result if only one element is omitted? (c) In what form should the allegations be made?

25. (a) How many pleadings are available for the use of defendant? (b) Name them. (c) What is the nature of each of these defenses?
26. (a) What is a dilatory plea? (b) How many classes of dilatory pleas are there? (c) Name them. (d) What is the result of using them out of their order as named? (e) What further can you say in regard to the nature of dilatory pleas?
27. (a) If a defendant does not use a dilatory plea, what available defense is next in order? (b) What is a demurrer? (c) What can you say of the nature and use of a demurrer?
28. (a) How is a pleading made more specific? (b) Why not use a demurrer to question a pleading for indefiniteness? (c) What question should control in the use of demurrers and motions?
29. (a) If a defendant cannot escape defending the action on its merits, what should he do? (b) What is the defendant's pleading to the merits of the action called? (c) Of what may this pleading consist? (d) If defendant has several defenses, what may he do?
30. (a) What may the plaintiff do to overcome the defendant's plea to the merits? (b) What is a second pleading to the merits by the defendant called? (c) What may the plaintiff set up to rebut the allegations of this second pleading? (d) How many pleadings may be filed in forming an issue in court? (e) By what is the number governed?
31. (a) Of what importance are the pleadings and issues? (b) How is an issue of law formed? (c) How is an issue of fact formed? (d) When are amendments allowed? (e) How are issues of law tried? (f) How are issues of fact tried? (g) Of what importance are the pleadings after final judgment?
32. (a) What may a party do after a trial in which he has been defeated? (b) For what are new trials granted? (c) What is a motion in arrest of judgment, and when will it be sustained?
33. (a) How may a student obtain practical knowledge in the study of pleading? (b) What matters should he observe in his study at the court house?

34. (a) What real actions were there at common law? (b) What can you say about their use at this time?
35. (a) What personal actions were there at common law? (b) Into what two classes were they divided? (c) Name those classes. (d) How many actions did each class contain? Name the actions of each class.
36. (a) What can you say about the action of assumpsit? (b) On what kind of contracts may assumpsit be maintained? (c) What was the effect of a seal on a contract, at common law? (d) What effect does a seal now have on the rights of the parties to a contract? (e) Name all the different contracts you can on which assumpsit will lie. (f) When will assumpsit not lie?
37. (a) How many different classes of actions of assumpsit? Name them. (b) When will special assumpsit lie? (c) When will general assumpsit lie? State fully. (d) What is meant by the phrase, "waiving the tort and suing in assumpsit"?
38. (a) Name fully the circumstances under which an action in general assumpsit can be brought on a special contract. (b) What may the plaintiff do if he has a special contract which is just and not forbidden by the law, and the defendant has received benefit under it, but the contract lacks some formality necessary to make it enforcible? (c) If the defendant has prevented the plaintiff from fully performing his contract, what remedy has he? (d) By what action may a person collect for extra work where there was a special contract for the principal work?
39. (a) When does the action of covenant lie? (b) What other action will lie on a sealed instrument, and when? (c) What is meant by liquidated damages? (d) By unliquidated damages? (e) When will the action of covenant not lie?
40. (a) When does the action of debt lie? (b) What is essential for the maintenance of an action of debt? (c) What is the rule where the contract is payable by installments?
41. (a) What can you say of the action of account? (b) When will it lie? (c) What other action does it supplement?
42. (a) How many actions in tort are there? Name them. (b)

What are the differences between actions in tort and actions on contracts? (c) What is the difference between judgments on contracts and in tort? (d) Why these differences? (e) What difference in bankruptcy between debts on contract and in tort?

43. (a) When does the action of trespass lie? (b) When is the use of force implied? (c) Can trespass be maintained for a negligent failure to perform a duty? (d) Can trespass be maintained for an injury to a servant in which the servant participated?

44. (a) What relation must the force bear to the injury to support trespass? (b) Would trespass lie for wrongfully throwing a log into a highway and thereby causing injuries to a traveler who stumbled over the log? (c) Would trespass lie for the damage done by other people in coming to a show operated on plaintiff's ground without his consent and without right?

45. (a) What character of ownership must be shown to support trespass? (b) What defense has a wrongdoer against plaintiff's action as regards title to the property injured? (c) Can a plaintiff maintain the action of trespass after the defendant has given up the property? (d) What is the rule where property is in the hands of a servant when the injury is done? (e) Where the lands injured are occupied by a tenant at will?

46. (a) What character of title must plaintiff show to maintain trover? (b) What kinds of property may be recovered by trover? (c) What is the remedy? In trover, does plaintiff recover the property, or damages for the injury, or what satisfaction does he obtain? (d) How did the action of trover originate, and for what goods? (e) Can trover be maintained for goods wrongfully taken? (f) What is the gist of the action of trover?

47. (a) For what kind of property may trover be maintained? (b) If a man wrongfully came into a house and took out the chandeliers and sold them, could the owner maintain conversion? (c) Could the owner of an account recover in trover from a man who collected it, falsely representing that he was the creditor's authorized collector? (d) Could a livery stable owner recover in trover from one who hired

a horse and sold or kept it? (e) Will trover and trespass ever lie for the same act? (f) Are they in any way concurrent remedies? (g) What are their similarities, and what their differences?

48. (a) Under what circumstances does trespass on the case lie? (b) Can it ever be maintained when the owner is not in possession? (c) Under what different classes of circumstances will case lie? (d) For what wrongs or neglects on the part of the defendant will case lie? (e) Will case lie when no force is used? (f) For injuries to what kind of property will case lie?

49. (a) For what injuries was the action of trespass on the case originated? Describe its origin. (b) Under what circumstances must the plaintiff bring trespass on the case? (c) If a man should turn a wild beast into the street and it injured another, would trespass on the case be the remedy? (d) If a person built a fire and negligently permitted it to escape to the premises of another, would trespass on the case lie? (e) Would trespass on the case lie against one who forcibly plowed up a lane over which plaintiff had an easement of right of way, where the land was owned by the defendant?

50. (a) For what wrongs does detinue lie, and what remedy does it furnish? (b) For what goods may detinue be maintained? (c) What is the gist of the action of detinue? (d) May detinue be maintained for goods which were rightfully taken? (e) Under what circumstances, and upon what proof? (f) May detinue be maintained for property which was wrongfully taken? (g) Could detinue be maintained to recover radiators wrongfully detached from the heating plant and taken from plaintiff's building? (h) Could detinue be maintained for doors after they were hung as part of defendant's building?

51. (a) When and under what circumstances does the action of replevin lie? (b) What kind of property does replevin cover? (c) What judgment is given the successful plaintiff in replevin? (d) May replevin be maintained if the goods were wrongfully taken? (e) If rightfully taken? (f) How soon is any relief given after an action of replevin is begun? (g) Upon what act of plaintiff is this

first relief founded? (h) Is the common law action of replevin in general use? (i) Why?

52. (a) What is the primary object of the action of replevin? (b) What, if any, distinction is there between detinue and replevin? (c) Relate the procedure under the earliest practice at common law, and how, if at all, it has been changed.

53. (a) How is the action of replevin in this country governed? (b) What is the procedure in obtaining the writ of replevin? (c) Why the precautions? (d) What proof is necessary to support replevin where the goods were rightfully taken? (e) If a man wrongfully collected an account against one of your creditors, representing that he was your agent, could you bring replevin for the money?

54. (a) Name the common law mixed actions. (b) Which of these were the original mixed actions at common law, and what was the origin of the others?

55. (a) When does the action of ejectment lie? (b) What is the gist of the action? (c) What character of title must the plaintiff show to support ejectment? (d) What proof of title must be made by plaintiff to recover against a wrongdoer? (e) For what was the action of ejectment originated? (f) What can you say of the present use of the action of ejectment?

56. (a) What must plaintiff prove to recover in ejectment? (b) Against whom is the action of ejectment brought? (c) How is the action brought at common law, and how may the title of the land be put in issue and tried in this action? (d) Upon what proof must the plaintiff recover if he recovers in ejectment? (e) What damages were allowed in ejectment at common law? (f) What, under modern practice? (g) If the plaintiff in ejectment proved that defendant had no right or title whatever to the land, and that by will plaintiff was to receive $500 a year out of the rents of the land, could he recover on such proof?

57. (a) When was the action of forcible entry and detainer first used? (b) For what property does forcible entry and detainer lie? (c) Can forcible entry be maintained to recover a strip of ground where there is a standing dispute over a boundary line fence, the plaintiff claiming ten

feet beyond the existing fence? (d) What is the purpose of the action, and what conditions does it aim to promote? (e) What can you say of the importance of title to the property in the action of forcible entry and detainer?

58. (a) What can you say as to the importance of the form of pleadings in common law actions? (b) If you think the forms of pleadings of any importance, state why, and if not, state why. (c) What, if any, changes in these forms should a pleader make in using them?

59. (a) Compare the common law actions with suits in equity. (b) Compare the common law courts with the courts of chancery. (c) What was the measure of relief in the court of chancery under the earliest practice? (d) What, if any, change has been made in this measure of relief in equity?

60. (a) What can you say concerning juries in the court of chancery? (b) Name some instances where the court of chancery would act? (c) What must the petitioner show to obtain relief in a court of chancery? (d) Can you recite any maxims of equity? If so, recite them and state what they mean.

61. (a) What can you say of common law and equity courts in this country? (b) Compare the forms of pleading in common law and equity cases: (1) in courts governed by codes; (2) in courts governed by the common law rules and the old equity rules of pleading. (c) What must be alleged by a petitioner to support a suit in equity? (d) Why do these differences in pleading and practice exist as between the common law actions and suits in equity?

62. (a) What do you know about divorces? (b) Why did the condition you have described exist under the early English law? (c) What was an ecclesiastical court? (d) How is the subject of pleading in divorce controlled in this country? (e) What other actions are mentioned in the text, and how are they governed as to pleadings?

63. (a) What effect have the codes upon the common law rules of pleading? (b) When was the code of New York adopted? (c) Of what other state is the code followed in many jurisdictions? (d) Why were some codes adopted as models for others?

64. (a) Name some of the principal features of the codes. (b) To what extent does the form of action control under the codes? (c) What is the object of the codes in regard to actions?

65-66. What is required to be stated in a pleading under any of the codes?

What evidence should be pleaded under the codes?

When should you plead legal conclusions?

What is the effect where conclusions or evidence are pleaded instead of facts?

What was the common law rule of pleading facts?

What should a lawyer know in order to draw a pleading under the code?

What, in particular, should be studied in order to gain an understanding of the subject of pleading?

67. (a) What effect does the character of the action have on the pleadings in an action under the code? (b) What is the effect under the codes if the wrong action is brought? (c) What is the rule in regard to pleading a greater or less wrong than was really suffered by plaintiff?

68. (a) What do you know about special actions under the code? (b) What governs the procedure and recovery in special actions? (c) What rules of pleading ordinarily govern in these special actions? (d) Why are special actions provided by statute?

69. (a) What is essential before the plaintiff can obtain a judgment after preparing his declaration or complaint? (b) What is the rule in regard to serving notice to bring the defendants into court? (c) In whose name must an action be brought: (1) at common law; (2) under the code? (d) What exceptions are there to the code rule with regard to the person who shall be named as plaintiff?

70. (a) What was the rule at common law in regard to actions on assigned contracts? (b) What is the rule under the code? (c) What was the common-law rule in regard to the assignment of contracts? (d) What is the modern rule? (e) Can a party assign and thus transfer his liability? (f) Can a person assign a right of action in tort? (g) What partial exceptions to this rule?

71. (a) Who should be plaintiffs in an action? (b) Who

should be defendants? (c) Give the differences, if any, between the common law and code rules as to who are proper parties defendant. (d) What is the rule as to proper defendants in an action on contract (the contract being joint and several): (1) at common law; (2) under the code?

72. (a) What change is made by the code in the common law rule with regard to parties in actions in tort? (b) Where there is a joint interest, who shall be made plaintiffs at common law? Under the code? (c) Where the interest is not joint, what is the rule as to joining plaintiffs? (d) Who may be made defendants in an action? (e) What may a defendant to an action in tort do to compel the joining of other parties as defendants? (f) What to compel the joining of other parties as plaintiffs? (g) What, if any, remedy does the plaintiff have if he recovers a judgment in tort against one defendant only, and finds him without property, but discovers that there is another defendant also liable who owns property?

73. (a) What remedy does a defendant have for a misjoinder or nonjoinder of parties in an action on contract in each of the following cases: (1) parties plaintiff under the common law, the defect being apparent on the face of the pleadings; (2) when such defect is not apparent; (3) under the code, the defect of parties being apparent; (4) under the code, the defect of parties not being apparent? (b) What is the effect, at common law, of not raising an objection that there is a defect of parties? (c) What is the effect, under the code, of not presenting the objection that there is a defect of parties?

74. What is the result of misjoinder or nonjoinder of parties defendant, under each of the conditions stated in the questions under § 73, next preceding?

75. (a) What must the plaintiff do after he has the law and facts well in mind, and has decided who shall be made parties, and determined upon the remedy? (b) What else must he consider? (c) What may he do if he has several causes of action of the same character against the same defendant? (d) What was the early rule in England regarding the bringing of several actions of the same

class? (e) What practice is now allowed in some states as to permitting recovery in a single action for more than one cause of action? (f) State how this practice was developed.

76. (a) What is the rule in regard to joinder of causes of action? (b) What is the rule in regard to stating the same cause of action in two or more paragraphs of plaintiff's pleading? (c) What may the defendant do when the same cause of action is alleged in more than one paragraph? (d) What was the common law rule as to joinder of actions? (e) What controls as to joinder of causes of actions?

77. (a) How should the plaintiff prepare his pleading: (1) in a common law state; (2) in a code state? (b) What should be the special care of plaintiff's attorney in preparing a declaration under the common law? (c) What under the code?

78. (a) What is the rule as to pleading only pertinent and material matter? (b) What facts must be alleged in a pleading? (c) How may the facts be stated: (1) at common law; (2) under the code? (d) Must the law be stated in a pleading? (e) What is the rule as to stating matters of which the courts take judicial notice?

79. Repeat the rules of pleading given in § 79.

80. (a) What is the rule in regard to pleading evidence? (b) What is the rule as to pleading matters of which the court takes judicial notice, and of what do they consist? (c) What is the rule in regard to alleging matter which should come from the other side, and what does this rule mean? (d) What is the rule as to alleging presumptions and matters necessarily implied from other facts? (e) What can you say concerning prolix and verbose pleadings?

81. (a) When is certainty of allegation in a pleading excused? (b) What is the rule in regard to pleading collateral matter? (c) What effect does the nature of the thing sometimes have on the question of certainty of averments? (d) What is the rule of pleading where the facts are peculiarly within the knowledge of the adverse party? (e) What is the rule for pleading matters of inducement and aggravation? (f) What is the rule where the subject matter has

been modified by statute in relation to the mode of performance?

82. (a) To what pleadings do the rules stated in the three preceding sections apply? (b) What is meant by referring to a pleading as double? (c) What is the rule in regard to double pleadings? (d) What will result from a violation of the rule as to double pleadings? (e) How should a person state two grounds of action or defense? (f) What is the rule as to stating the same action differently in different paragraphs? (g) What is the rule as to stating one defense differently in different paragraphs?

83. (a) What is the rule as to alleging place? (b) Why is this rule necessary? (c) What is a videlicet and what is its use?

84. (a) What is the rule for alleging time? (b) To what extent is this rule enforced? (c) What is the rule in respect to alleging quality, quantity and value? (d) How is it enforced in the matter of stating quality? (e) How is it enforced as to stating quantity? (f) How and in what terms should value be alleged? (g) What is the rule in regard to pleading names, its meaning and the effect of its violation?

85. (a) What is the rule as to pleading title? (b) When is this rule applicable and what is the effect of its violation? (c) What is the rule for pleading authority? (d) What is its meaning and how is it applied? (e) How should authority be alleged?

86. (a) What is required as to certainty of allegations? (b) What is the real force and effect of Rule VIII? (c) What is the only safe rule as to certainty in pleading? (d) What is the effect if the facts are alleged with unnecessary certainty?

87. (a) How many rules are given to prevent obscurity and confusion in pleadings? (b) Repeat each of them. (c) Do they or do they not apply to code pleading? Which of them do not?

88. (a) What is meant by inconsistent or repugnant pleadings? (b) What is an ambiguous pleading? (c) What is its effect? (d) How will the ambiguous allegations of a plead-

ing be construed? (e) What is an argumentative pleading? (f) How should facts be alleged?

89. (a) What is meant by pleading in the alternative? (b) How should two matters be alleged, when one of them, if proved, will make out the cause of action or defense? (c) What is meant when pleading by way of recital is referred to? (d) What effect follows if matter of inducement is pleaded by recital? (e) What is the effect if an essential element of the cause of action or defense is pleaded by way of recital? (f) How should allegations of material facts be made?

90. (a) What is the common law rule in regard to pleading matters according to their legal effect? (b) What exception is there to this rule at common law? (c) What is the code rule with respect to pleading matters according to their legal effect? (d) What is the code rule for pleading the contents of writings sued on? (e) What is the rule concerning the use of forms of expression? Why follow this rule? (f) What is the rule as to sufficiency of a pleading bad in part? (g) Give a reason for this rule.

91. (a) What is the rule prescribing the proper conclusion of a declaration? (b) What amount of damages should be alleged? (c) Why is it necessary to allege damages? (d) What is the form of alleging the production of suit?

92. (a) What is the rule as to making profert of a deed? (b) What is meant by this rule? (c) When does the rule apply? (d) What is the code rule as to pleading writings sued on? (e) What is the rule in regard to exhibits?

93. (a) What effect has the mere copying of a written instrument in a pleading, without referring to its legal effect? (b) What is meant by oyer? (c) What is the rule as to craving oyer? (d) What is the rule as to pleading dates and names in instruments of writing which are pleaded? (d) What should be pleaded as to compliance with statutory requirements in regard to a written instrument?

94. (a) How should pleadings be entitled, and what should the title contain? (b) How are the pleadings subsequent to the declaration entitled where the parties are numerous? (c) How may the student get a concrete idea of pleadings in actual use?

95. (a) What facts must the plaintiff's pleading embrace? (b) What effect has the common law form as embracing facts not recited? (c) What information should the defendant be given by his adversary's pleading? (d) How should the plaintiff allege facts where the form he is following does not fully cover them? (e) Of what use are code forms of pleading?

96. (a) What do you know about pleadings which must be sworn to? (b) What was the equity rule as to verifying pleadings by oath? (c) What was the common law rule? (d) What is the rule in the United States? (e) What is the effect of omitting the oath where a pleading is required to be sworn to? (f) What can you tell about signing pleadings?

97. (a) What is meant by filing a pleading? (b) How is the filing of a pleading accomplished? (c) What is meant by the præcipe for a summons to issue? (d) What was the common law rule as to directing that summons should issue, and when it should be returnable?

98. (a) What is the rule as to filing the declaration before there is any right of obtaining relief? (b) What preliminary relief may be had in replevin and attachment? (c) What must be done before the court will undertake to render a judgment?

99. (a) What must a lawyer take into consideration when consulted by a client who has been sued? (b) What information should he obtain from his client? (c) What other information should he seek? (d) What matters of defense must he consider? (e) What objections may the defendant waive?

100. (a) What is said about choice as between dilatory pleas? (b) How many kinds of dilatory pleas are there? (c) Name each. Under what circumstances may each be pleaded? In what order may they be used? (d) Give the reasons you can remember for filing each kind of dilatory plea.

101. (a) What are pleas in abatement and to what do they relate? (b) When are pleas in abatement used? (c) Which of the dilatory pleas is a plea to the merits? (d) What is the effect of an effort by the defendant to get a

judgment on the merits under a plea in abatement? (e) Why is this rule?

102. (a) What is the effect of filing a plea in abatement and a a plea to the merits at the same time? (b) How are dilatory pleas construed? (c) What is the judgment when a plea in abatement is sustained? (d) What is the judgment when such a plea is overruled?

103. (a) What may the defendant do if he appears to the action and waives his right to challenge the jurisdiction? (b) How can the defendant obtain a decision as to the legal sufficiency of plaintiff's pleading? (c) What is a demurrer?

104. (a) What was the rule of the early common law for rendering judgment on demurrer? (b) What was the rule as to permitting amendments? (c) What is the modern rule with respect to demurrers and the amendment of pleadings?

105. (a) Is the old common law practice regarding demurrers still in use? (b) When are demurrers available? (c) What now determines the available grounds of demurrer? (d) Name some of the grounds for demurrer to a declaration often used. (e) How many classes of demurrer? Name them. (f) What are special demurrers?

106. (a) What practice may be followed where general demurrers are used, and under what conditions is this good practice, and why? (b) What is sometimes the effect of a special demurrer? (c) What does a demurrer question? (d) What defects are not questioned by a demurrer?

107. (a) When will a demurrer lie to a pleading subsequent to the declaration? (b) What does a demurrer to such a pleading question? (c) What is the effect if both the declaration and the plea are bad, and plaintiff demurs to the plea? (d) Give the reason why the demurrer has this effect.

108. (a) What is the rule as to the forms of pleadings and demurrers: (1) at common law; (2) under the code? (b) Where the allegations are sufficient, but too general, how does the opposite party require them to be made more specific? (c) Should the motion to make more specific always be used when available? Why? (d) Give the cor-

rect rule (in your own language) governing the filing of a motion to make more specific.

109. (a) What is defendant's first pleading called? (b) Repeat the rules on the subject of pleading as stated in this section.

110. (a) What is the general rule as to the time for filing a dilatory plea? (b) Why this rule? (c) What is the rule as to the order of filing dilatory pleas and defenses to the merits? (d) What is the consequence if a party uses a defense out of the order prescribed by law? (e) What is the reason for the rule requiring a dilatory plea to give a better writ? (f) What must be shown by a dilatory plea?

111. (a) What is the object of Rule IV? (b) Why is the motion used? (c) What pleading served the purpose at common law for which the motion to strike out is now used? (d) What is the remedy where a pleading is not signed?

112. (a) What defense may be offered where no benefit can result from a motion or demurrer? (b) Of what may a plea to the merits consist? (c) State the two principal classes of pleas in bar? (d) What is the most frequent plea: (1) at common law; (2) under the code? (e) What were the two common traverses at common law? Give their names. (f) Name the services which each performed.

113. (a) What is permitted in the way of denying part of a pleading and setting up new matter as a defense to part of it? (b) What is a traverse? (c) What is a denial? (d) What service does the general denial perform? (e) What can you say of its use? (f) State what you know of special denials.

114. (a) What can you say about traversing only part of the declaration or other pleading? (b) Why is this form of plea used? (c) When is a general traverse the proper pleading? (d) What is the usual form of general denial under the codes? (e) What is the name for pleading a general traverse at common law? (f) What exceptions are there to the right of pleading a general traverse at common law? (g) What is a frequent exception under the codes to the right of pleading the general issue? (h) How is the

execution of an instrument in writing denied under the codes?

115. (a) What was the plea of non assumpsit and what did it put in issue? (b) What defenses does it cover? (c) What is the rule as to pleading non assumpsit in actions on special contract? (d) When must the defendant plead specially?

116. (a) What is the general issue in debt on simple contract? (b) What is its form and what does it put in issue? (c) What is the general issue in debt on a sealed instrument? (d) Where the writing has no seal? (e) What does non est factum deny, and what does it put in issue? (f) What is the general issue in an action on a judgment? (g) What is the proper method of pleading a release depended on as a defense?

117. (a) What is the general issue in detinue? (b) What does it deny, and put in issue? (c) What is the general issue in trespass? (d) What does it deny, and put in issue? (e) If defendant wishes to justify an act he admits doing what must he plead? (f) What is the general issue in trover? (g) What does it deny, and put in issue? (h) What is the general issue in trespass on the case? (i) What does it deny, and put in issue? (j) What the general issue in replevin? (k) What does it deny, and put in issue? (l) Is this always the defense in an action of replevin? (m) If not, what other defense is sometimes pleaded? (n) What is the general rule applying to all general issues?

118. (a) Discuss the general issue as a replication? (b) When is it broad, and when not so broad?

119. (a) When is the special traverse a proper plea? (b) What is its form? (c) What is its use? (d) Is it much in use today?

120. (a) Describe the requisites of a good traverse. (b) What may be denied by the traverse? (c) Upon what is a party forbidden to form an issue by a traverse? (d) How may he raise an issue upon that matter if not by a traverse? (e) How may a party tender an issue on an instrument under seal?

121. (a) What is required as to the verification of pleadings?

(b) What defenses may be made under the general denial? (c) What cannot be shown by way of defense under the general denial? (d) What is the rule where the plea of general denial is not allowed? (e) What do you know about the joining of inconsistent defenses?

122. (a) What is meant by pleading in confession and avoidance? (b) What two general classes of pleas in confession and avoidance are there? (c) What is a plea in justification? (d) What is a plea in discharge? (e) Do pleas in justification and discharge tender an issue? (f) What is "color" in a pleading of confession and avoidance, and how must it be pleaded? (g) What is the rule where the new matter alleged really amounts to a denial? (h) Why is this rule enforced? (i) What is the general rule of the codes on this subject?

123. (a) What is required as to giving color to the opponent's pleading when answering specially? (b) What two classes of color are there? (c) Name them. Define each. (d) Why was the rule of express color adopted?

124. (a) Why does the rule exist which requires the defendant either to demur or plead? (b) What were the formal endings of pleas and why were they used? (c) Why was the acceptance of an issue required whenever tendered?

125. (a) What is a departure? (b) How may a departure occur? (c) Under what systems of pleading, if any, are departures allowed? (d) Give an example of departure. (e) Recite the rule forbidding departures in pleading.

126. (a) When and how should the general issue be pleaded? (b) How is this rule qualified? (c) Why is the rule so qualified? (d) Why was it adopted? (e) Give an illustration of the rule as to pleading the general issue whenever it covers the defense offered.

127. (a) What is surplusage? (b) When may surplusage be used in a pleading? (c) To what should a pleader confine his allegations? (d) How may a pleading be purged of surplusage?

128. (a) Recite the rule prescribing forms of conclusions to be used in pleas. (b) What does each conclusion mean? (c) When is a conclusion to the country proper? (d) When is a verification proper?

129. (a) Under what circumstances must the defendant plead a defense? (b) What rule should guide an attorney in deciding whether or not to plead a defense specially? (c) What action must be taken to present an equitable defense?

130. (a) What is meant by a disclaimer? (b) What is its use? (c) What should it embrace? (d) How may a defense be pleaded which arises after suit: (1) at common law; (2) under the code? (e) How soon must the defendant answer? (f) What controls as to the time of pleading? (g) What is the rule as to joining and separating defenses?

131. (a) What is the rule as to pleading partial answers: (1) at common law; (2) under the code? (b) What is meant by set-off? (c) By counterclaim? (d) What are the rules governing their use?

132. (a) What is the plaintiff's second pleading called? (b) What must it contain? (c) What is the effect of pleading new matter in it? (d) What effect has a reply of denial? (e) What was the rule at common law? (f) At present, in many states? (g) What limit is imposed, in some states, upon the number of pleadings by plaintiff? (h) What general rules govern the second pleading by plaintiff?

133. (a) Why must plaintiff conform his second pleading to the allegations of his first pleading? (b) What can you say of departure? (c) Where the plaintiff's plea is insufficient, what is the rule as to procedure? (d) What is the rule regarding the number of paragraphs of reply to a single paragraph of plea?

134. (a) What rule regulates the closing of the issues: (1) at common law; (2) under the code? (b) What, if any, limitation is put upon the number of pleadings in a series to prove an issue?

135. (a) What pleadings may be filed after the replication? (b) When is the case ready for trial? (c) What effect have the pleadings on the proceedings at the trial?

136. (a) What do you know about new trials? (b) What should the attorneys do on motion for a new trial? (c) What is a special verdict and what must it contain? (d) What effect have the pleadings on the judgment rendered?

QUIZ QUESTIONS

PRACTICE IN CIVIL ACTIONS

(*The numbers refer to the numbered sections in the text.*)

1. What is the first instrument to file in beginning a law suit and what is set forth therein?
2. Suppose that a necessary party fails to join in the suit without its being shown that such party is lawfully excused from so doing, can the suit be maintained?
3. When filing a praecipe in a case where you are in doubt as to who should be parties defendant, how will you proceed?
4. Distinguish between joint and several actions on the part of those bringing suit.
5. (a) In an action ex contractu the plaintiff fails to join all the defendants. Is this fatal? (b) What is the rule in actions ex delicto with reference to the same matter?
6. Define the writ of summons and state in what manner it should be served in order to give the court jurisdiction of the person.
7. A brings suit against B; summons issues and is returned served upon B by C, while in fact D is the sheriff of the county. How would you take advantage of this?
8. To what extent, if at all, have statutory enactments changed common law rules regarding pleadings and the burden of proof thereunder?
9. Under what circumstances may one party propound written interrogatories to the adverse party, and how may the court compel the adverse party to answer the same?
10. Defendant, upon examination, discovers that plaintiff's pleadings do not sufficiently set forth that the court has jurisdiction of the subject matter. How can this be taken advantage of by defendant?

11. Smith brings action against Jones; Jones demurs to the declaration. The demurrer is sustained and Smith is given leave to file an amended declaration within ten days. This he fails to do. You are Smith's counsel. What action will you take?
12. Suppose your client desired to take a change of venue. To what extent would you consider it necessary to examine the statutes of the state in which the action is pending?
13. Under what circumstances and in what class of cases may the courts give a more speedy hearing to the litigants than is usual in other cases?
14. A asks that his cause against B be continued on the ground that a material witness is ill; B replies that he will admit that if such witness were present he would testify to such facts as A may set up in an affidavit. A refuses to make the affidavit. Ought the cause to be continued?
15. What do you understand by rules of court and how far are they binding upon litigants?
16. A sues B in assumpsit and does not desire a trial by jury; B desires that a jury be called and refuses to consent to a trial by the court. At the conclusion of the case will there be a verdict or a finding?
17. Ought the fact that the cause is being tried before the court without the intervention of a jury, to affect the rules of evidence regarding the admissibility of testimony?
18. A case is being tried before the judge. The plaintiff desires to obtain the ruling of the judge on certain propositions of law in order to preserve his record for appeal. How may he properly proceed to do so?
19. In a trial before the court is it properly within the scope of his authority to find both as to the law and as to the facts?
20. A verdict is rendered against the defendant; time within which to move for a new trial, for arrest of judgment, or to pray an appeal has expired. Under what circumstances, if any, may defendant be heard on such motions and, if same are denied, have his case reviewed on error or appeal?
21. We speak of the finding of a court and the verdict of the jury. What is the distinction between them?
22. What is meant by trial by jury? At common law how may men constitute a lawful jury?

23. In what way or manner are the jurors selected from the general panel to try any particular cause and who determines their qualifications?
24. From what source are the names of tentative jurors secured and by what process are they brought into court?
25. A case is called for trial and the court orders a jury to come. Whose duty is it to call the names of the jurymen, to direct them to appear and await their examination?
26-27. Is the examination of jurors primarily a right of counsel or merely a privilege?
28. What is meant by challenge to the array and under what circumstances may it be exercised: (a) in civil cases; (b) in criminal cases?
29. Counsel for A in a civil suit challenges a juryman on the ground that he is a relative of B, the plaintiff. Under what circumstances will such challenge be allowed for cause, and when will it be error to refuse it?
30. Distinguish between peremptory challenges and challenges for cause.
31. When the jury has been selected, what is the next step in the proceeding to try the cause?
32. Would you favor the appointment of official court reporters? If your answer be yes, state under what circumstances.
33. In the trial of a certain case between A and B, the burden of proof rests upon B. Which has the right to open and close, A or B?
34. In making an opening statement counsel becomes argumentative and objection is made for this reason. Ought this objection to be sustained?
35-36. The plaintiff and defendant are in court, each with numerous witnesses; neither party desires that the witnesses on the opposite side hear the witnesses testifying on his side. Can this be prevented, and if so, in what manner?
37. What is a deposition? State its object and effect and under what circumstances it may be read in evidence.
38. In preparing a case for trial you discover that it will be impossible for you, by legal process or otherwise, to bring a certain material witness into court. What will you do in order to secure the testimony of such witness, either upon oral or written interrogatories?

39. Distinguish between local and transitory actions at common law and state wherein this distinction has any bearing upon the question of venue.
40. May one party call and examine the opposing party as a witness, and if so, when?
41. A case is called and both parties declare themselves ready for trial. Which party should first present his evidence?
42. Define the proper limits of cross-examination.
43-44. What is a non-suit? Distinguish between a voluntary and an involuntary non-suit, and give the general rules of law governing each.
45. If plaintiff fails to establish his cause of action, or defendant his ground of defense, what will you ask the court to do if you represent the plaintiff? What will you do under like circumstances, if you represent the defendant?
46. Distinguish between an objection and an exception, and state the purpose of preserving exceptions in the record.
47. In what manner should the court proceed to instruct the jury on the questions of law as applicable to the facts of the case?
48. Counsel for plaintiff desires to argue the case to the jury, but the court refuses to permit him so to do. Is this error and under what circumstances may it be considered reversible error?
49. At what stage of the proceedings should the court give to the jury the law governing the case?
50. After the court has charged the jury on the matters of law, what is the next step in the proceedings?
51. What is a verdict? How should it be returned into court?
52. When the verdict is correct in form, what order should the court direct the clerk to enter to the end that the verdict may become a part of the record?
53. Suppose the verdict is informal, what would be the duty of the court upon his attention being called to that fact?
54. (a) If you represented the party against whom the verdict was returned, what would you do in order to preserve the rights of your client? (b) What is the purpose of a motion for a new trial and should it direct the attention of the court to all of the alleged errors?
55. Your motion for a new trial is denied. What can you incor-

porate and take advantage of in a motion in arrest of judgment?

56. Distinguish between a verdict and a judgment and state what is necessary to be done in order to merge the verdict into a judgment.
57. The court having entered judgment against your client, what can you do to obtain a review of the cause in the higher courts, and how can you prevent the successful party from immediately obtaining execution upon the judgment?
58. Distinguish between an appeal and a writ of error, and state under what circumstances each is the proper proceeding.
59. In a case where your client must sue out a writ of error, but desires to stay the execution, pending the final determination of the cause, what remedy has he and what is necessary to secure his rights?
60. Is the right to appeal or sue out a writ of error conferred by common law or by statute, and who may exercise such right?
61. If you desire to appeal or sue out a writ of error, how will you ascertain the time within which you can do so?
62-63. You represent the successful party. The defeated party prays an appeal, but does not perfect the same. He then sues out a writ of error, but does not have it made a supersedeas. Does this affect your right to have execution?
64. What is the office of a bill of exceptions and what should it contain?
65. After your bill of exceptions has been settled and filed with the clerk, you desire the record to be made up. What paper must you file with the clerk?
66. What are the object and purpose of the assignments of error and what should be set forth therein?
67. Your opponent files his abstract of the record; it is incomplete. What will you do?
68. What is a brief and what should it properly contain?
69. Under what circumstances is oral argument in the reviewing court permissible?

QUIZ QUESTIONS*

LAW OF EQUITY PLEADING

(The numbers refer to the numbered sections in the text.)

1. What is the nature and function of a court?
2. Define jurisdiction.

3-4. (a) Define equity pleading. (b) What relationship does it bear to equity jurisdiction? (c) Into what classes is equity pleading divided?

5. Trace the history of equity pleading.
6. (a) Define complainant, plaintiff, grounds of suit, cause of action. (b) A files a bill in equity asking that a horse be replevied. What will the court do with the prayer? Why?
7. Distinguish between and define ultimate facts, conclusions of law, pleadable facts, operative facts.
8. What is the issue of facts?

9-10-11. How must facts be stated? Give examples of violations of the rules stated.

12. Is there any difference as to strictness between common law and equity pleading? If so, state it.
13. Of what matters is the plaintiff relieved in stating his cause of action?
14. How may impertinent matter be removed? What is the federal rule on this point?
15. What is scandal, and what remedy does the court possess to expunge scandal?
16. What is an evidentiary fact? How does it differ from an ultimate fact?
17. In a bill for divorce, the complainant states that "B committed repeated acts of cruelty." A statute provides that "repeated acts of cruelty" shall constitute a ground for divorce. Is the statement a conclusion of law?

* Prepared by general editors.

18-19. When does a bill of discovery lie? How is discovery stated?

20. Give rules of construction of pleadings in equity.

21-22-23. When and where may an alien not sue in a court of equity?

24. What exceptions existed to the general equity rule as to equity suits by married women?

25. A, an idiot, seeks to file a bill in equity. Who must be a party with him?

26-27. If an infant sues for specific performance, must he have a next friend? Is the same true, where he is sued?

28-29. (a) Into what classes are parties divided in equity? (b) Why does equity seek to avoid a multiplicity of suits?

30. State the exceptions to the rule that all interested persons should be made parties to an equity suit.

31. Distinguish between a bill and an information.

32. Are bills of discovery used frequently in practice? Why?

33. Name and describe the formal parts of a bill.

34. What is a verification?

35. What rules apply as to the stating part of a bill?

36. For what purposes is the charging part of a bill used?

37. A, the complainant, includes interrogatories in his bill against B, the defendant, requiring answers of C. Is this proper?

38. What is the address? Give examples.

39-40-41-42. Draw a bill including all of its parts.

43. What is the subpœna in the bill?

44. To what does an attorney certify when he signs a bill? Who verifies the bill?

45. What is meant by the joinder of causes of action?

46. Distinguish between multiplicity of suits and multifariousness.

47. Give an example of a bill with a double aspect.

48. Of what service is the replication?

49. Name the defendant's pleadings. What exceptions are there in the federal courts?

50. Does a demurrer to a bill differ from a demurrer to a declaration?

51. If a demurrer is overruled, what is the next step for the defendant?

52-53. Name and define the kinds of demurrers. For what purposes are they filed?

54. Give the grounds for a demurrer.

55. What facts are admitted by a demurrer? If the demurrer is overruled, and the defendant answers, what facts are admitted at the trial?

56. Define a plea.

57. Give the purposes of a plea.

58. Explain the phrase, "the plea must be single."

59-60. State when a multifarious plea is allowed.

61. Distinguish separate pleas to separate parts of a bill from multifarious pleas.

62. What rules apply to the statement of a plea?

63. Give the three bases for the classification of pleas, and the elements of the classes.

64-65-66. Distinguish between pure, anomalous and negative pleas.

67. What limitations exist with reference to the negative plea?

68. What pleas are to the essentials of a bill?

69. Divide pleas to the jurisdiction into classes.

70. What do pleas to the person attack?

71. Distinguish pleas to the frame of the bill from the other pleas discussed.

72. A sues B in equity in Chicago and also in Evanston, both being cities in the same county in Illinois? Is this proper?

73. How may the defendant attack a defect of parties in an equity suit?

74-75. How may multiplicity and multifariousness be attacked?

76. Name and define the pleas in bar.

77. What is meant by the determination of the plea?

78. What are the rights of the defendant: (a) where he proves the facts in his plea; (b) where the plea is overruled; (c) where the plea, although a defense, has been informally pleaded?

79. Where does the defendant file an answer?

80-81. What is the office of an answer and what must it meet?

82. What is meant by the phrase, "knowledge, information and belief"?

83. Give the rule as to answering interrogatories.

84. What general rules of pleading apply to answers?
85. An answer to a bill for divorce attacks the character of the complainant. Is it objectionable?
86. What are irrelevant facts? If objectionable, how removed?
87-88-89-90. Explain the effect on the plaintiff of an answer under oath and of an answer not under oath. Does a waiver of the oath by the plaintiff affect the rules?
91. What is an answer in support of the plea?
92. When is it unnecessary to answer?
93. Explain the use of a cross-bill.
94-95. When may a bill be amended?
96. What are the defendant's rights of amendment?
97. May an amendment be made after a final decree? Why?
98. Distinguish between an amendment pleading and a supplemental pleading.
99-100. What are exceptions? When are they heard?
101. Explain the procedure to obtain a judgment pro confesso.
102. What is an interlocutory decree? A final decree?

QUIZ QUESTIONS

LAW OF EVIDENCE

(The numbers refer to the numbered sections in the text.)

1. What is the primary conception of evidence?
2. How does evidence make facts clear and plain?
3. How is evidence defined? How is it distinguished from reasoning?
4. What is the difference between judicial evidence and extra-judicial evidence? In what forms may judicial evidence be presented to legal tribunals?
5. What is testimony? What is documentary evidence? What is real evidence?
6. What is an evidential fact? What is an ultimate fact?
7. Why does a legal tribunal refuse to receive proof of facts irrelevant to the existence or non-existence of the disputed facts in a given case?
8. What place has the law of evidence in the general scheme of the law?
9. How is the law of evidence defined?
10. How do legal tribunals determine in a case what are the ultimate facts concerning which evidence is required?
11. Are the rules of logical relevancy and those of the law of evidence the only tests as to the admissibility of evidence in a given case? If not, why not?
12. Why are matters logically probative of the ultimate facts of a case generally admissible?
13. How is the existence of the excluding rules of the law of evidence to be accounted for?
14. State the rule excluding unimportant, misleading and prejudicial matters.
15. In an action brought by A against B to recover damages for injuries sustained by the former when the latter's ele-

vator fell while the former was a passenger upon it, A offers to show that, shortly after the accident, B placed an air cushion in the elevator shaft. What objection could B's counsel urge against the reception of the evidence offered by A?

16. In an action brought to recover damages for death alleged to have been caused by the defendant's failure properly to light the approach to a bridge, the plaintiff offers to show that another person was killed at the same place at another time under similar circumstances. What objection could the defendant's counsel urge against the reception of these facts?
17. State the corollaries to the rule excluding unimportant, misleading and prejudicial matters.
18. A brings action against B to recover damages for injuries caused when the latter's dog bit the former. To establish that B knew the dog was vicious before A was bitten by it, A offers to show that the animal had previously bitten others who had complained to B of the dog's ferocity. B's counsel objects to the reception of these facts. Should this objection be sustained or overruled? Why?
19. State the rule excluding evidence as to the character of either party to a litigation.
20. Why is character evidence in general inadmissible?
21. On the trial of an indictment against X for murder the defense offers evidence as to the general good character of the accused. Is the evidence admissible?
22. In the same case the prosecution then offers evidence of the general bad character of the accused. Is the evidence admissible?
23. In an action brought by A against B to recover damages for the breach of a promise to marry, A proves that, after the promise was made, B had seduced her. B then offers to show A's general reputation for unchastity prior to the seduction. Is the evidence admissible?
24. What is meant by admissible evidence as to character?
25. On the trial of an indictment against A for murder, B, who has known A intimately for many years, is called by the defense as witness and asked if in his opinion A is the

kind of man who would commit a murder. Is the question objectionable? Why?

26. In an action brought by A against B to recover damages for slander, A proves that B had orally published concerning her a statement imputing unchastity to her. In mitigation of damages B then offers to show A's general reputation for unchastity. Is the evidence admissible?
27. What is a confession? State the rule excluding confessions.
28. Why are involuntary admissions of criminal guilt excluded?
29. What is meant by a voluntary confession?
30. On the trial of an indictment against A for murder, the prosecution offers to show that A had admitted his guilt to a prison chaplain when the latter had exhorted him "to repair any injury done to the laws of his country." Is the confession admissible?
31. Who must decide whether or not a confession was voluntarily made? Is proof of a voluntary confession conclusive on the question of the guilt or innocence of an accused?
32. Are facts learned as the result of an involuntary confession inadmissible because the confession is inadmissible?
33. State the rule excluding hearsay evidence.
34. Why is hearsay evidence inadmissible?
35. When does the rule against hearsay evidence apply to a statement presented to a legal tribunal otherwise than by the testimony of the person who made the statement?
36. Give an illustration of a statement which, although presented to a legal tribunal otherwise than by the testimony of the person who made it, would be original evidence and not hearsay.
37. Why are there exceptions to the rule excluding hearsay evidence?
38. How do courts deal with hearsay evidence?
39. State the exception to the rule against hearsay evidence in favor of reported testimony.
40. In an action for breach of an oral agreement, X, who was a witness on a former trial between the same parties for the same cause, when called as a witness, testifies that his testimony on the former trial was true, but that he can no longer recollect the facts to which he then testified. May

the testimony given by X on the former trial be shown otherwise than by his testimony?

44. State the exception to the rule against hearsay evidence in favor of dying declarations.

45. On the trial of an indictment against A for the murder of B, the prosecution offers to show that B made a statement imputing the crime to A just after B had been informed by physicians that his wound was very dangerous, but not necessarily fatal. Is the evidence admissible?

46. On the trial of an indictment against A for the murder of B, the prosecution offers to show that, when B was dying and had abandoned all hope of recovery, he had made a statement that he had struck A and that A was not to blame for what had happened. Is the evidence admissible?

47. State the exception to the rule against hearsay evidence in favor of declarations in questions of pedigree.

48. What is a question of pedigree?

49. In an action to recover the price of certain horses, the defendant pleads infancy, and, to establish his defense, offers in evidence an affidavit made by his father, since deceased, in a suit between his father and X. The affidavit recites the date of the present defendant's birth. Is it admissible?

50. State the exception to the rule against hearsay evidence in favor of declarations as to matters of public or general interest.

52. What is meant by public or general interest?

53. What is the difference between public interest and general interest? How far is this distinction useful?

54. What is meant by the phrase "ante litem motam" in the statement of this exception to the hearsay rule?

55. On the trial of a proceeding to establish the location of a private boundary, evidence of declarations of deceased persons, who had means of knowing the location of the boundary, is offered to show its location. Is the evidence admissible?

56. State the exception to the rule against hearsay in favor of public documents.

57. What is a public document?

60. What is an ancient document?

61. State the exception to the rule against hearsay evidence in favor of documents of ownership of land executed beyond living memory.

64. What is meant by the phrase "proper custody" in the statement of the ancient possession exception to the hearsay rule?

66. State the exception to the rule against hearsay evidence in favor of entries and declarations against interest.

67. What is the difference between a declaration against interest and an admission?

70. State the exception to the rule against hearsay in favor of account books of parties to a litigation.

73. In a suit to recover for services rendered, the plaintiff offers in evidence a book of accounts containing entries charging only the defendant for services. Is the book admissible?

74. In an action to recover a loan of $2,500, the plaintiff offers in evidence a book in which the defendant was charged with the amount sued for. Is the book admissible?

77. What is the present utility of the account book exception to the hearsay rule?

78. State the exception to the rule against hearsay in favor of entries and declarations of third parties made in the regular course of duty or business.

81. In a suit against the indorser of a bill of exchange, an entry made by a notary's clerk, since deceased, in the usual course of his business, in a book regularly kept by him for the record of such matters, is offered in evidence to show demand and dishonor of the bill. Is the entry admissible?

83. What extension of this exception to the rule against hearsay evidence has been made by American cases?

84. State the exception to the rule against hearsay evidence in favor of declarations bearing upon the physical or mental condition of the declarant or upon his intention.

89. For what purposes are statements of testamentary intention provable?

90. State the exception to the rule against hearsay evidence in favor of declarations which are a part of some fact or transaction that is itself admissible.

91. In an action to recover damages sustained by A when she was bitten by B's dog, evidence of a declaration made by

A to her mother five minutes after she was injured is offered. Is the evidence admissible?

92. State the rule excluding the opinions of witnesses.
94. What is the difference between matter of fact and matter of opinion?
95. When is opinion evidence admissible?
97. On the trial of an indictment for murder, an ordinary witness for the prosecution is asked whether or not in his opinion certain hairs which he found on a club near the scene of the crime were human hairs. Should the opinion of the witness be received?
98. What is expert opinion evidence?
102. What is real evidence?
105. On the trial of an indictment against A for selling intoxicating liquor to an Indian in violation of statute, it is necessary to determine whether or not X, the party to whom the liquor was sold, is an Indian. The prosecution offers to exhibit X to the jury for their inspection. Counsel for the defendant objects to such a proceeding. Should the objection be sustained or overruled? Why?
107. What is a document?
108. What is an attested writing?
110. How is the execution of unattested writings shown?
111. How is the execution of attested writings shown at common law?
112. Under what circumstances at common law may an attested writing be used as evidence without proof of its execution?
113. What statutory modification has been made of the common law rule prescribing the manner of proof of the execution of an attested writing?
114. When is proof of the execution of a writing unnecessary?
115. State the "best evidence rule."
116. Mention several written inscriptions that are not writings within the "best evidence rule."
118. Under what circumstances is production of an original writing under the "best evidence rule" dispensed with?
120. State the so-called "parol evidence rule."
123. What rule of the substantive law of contracts is usually incorporated into the statement of the so-called "parol evidence rule"?

124. Does this rule of contract law apply in proceedings between persons who are not parties to an agreement?
125. What rule of the substantive law of wills is usually incorporated into a statement of the so-called "parol evidence rule"?
128. State the rules governing the construction of writings.
131. State the rule of the law of evidence excluding evidence of declarations of the maker of a solemn instrument concerning the intentions he sought to express in such an instrument.
132. Why does this rule obtain?
133. What is an equivocation? Give an example of an equivocation. What effect has the existence of an equivocation in a solemn instrument?
135. What is meant when it is said that a witness is competent?
136. What rules as to the incompetency of witnesses were prescribed by the law of evidence at common law?
138. How far have these common law rules as to incompetency been modified by statute?
140. What is the difference between an incompetent witness and a privileged witness?
141. What is the privilege against self-incrimination?
143. How does one accused of crime claim the privilege against self-incrimination?
144. What effect has the assertion of this privilege by an accused?
145. May an accused waive the privilege? How does he do so?
147. How does an ordinary witness claim the privilege? What effect has the assertion of the privilege by such a witness?
149. Under what circumstances is a witness not allowed to assert the privilege?
151. What communications between attorney and client are privileged?
152. In an action on a promissory note, the attorney to whom the note was given for collection is called by the defendant to testify whether the note was indorsed when delivered to him. Is the evidence objectionable? If so, upon what ground?
153. In an action for the conversion of goods, the plaintiff becomes a witness in his own behalf. On cross-examination

he is asked to relate what he had said to his attorney on the day the goods were taken, concerning an exchange of the goods for a certain note. The question is objected to on the ground that what the plaintiff had told his attorney is privileged. Should the objection be sustained or overruled? Why?

154. Distinguish between marital incompetency, anti-marital privilege and privileged marital communications.

155. What are the three principal stages in the conduct of a legal proceeding?

156. Explain briefly the manner in which a witness is examined on trial of a legal proceeding.

158. In an action to recover for work and materials, the plaintiff, who becomes a witness in his own behalf, proposes to examine a copy of entries in his books of account in order to refresh his recollection. The defendant's counsel objects. Should the objection be sustained or not? Why?

159. On the trial of a proceeding for a divorce, the defendant's counsel moved that the plaintiff's witnesses be examined out of the hearing of each other. The court denied the motion. Was the denial of the motion error?

162. May a party ever discredit a witness called by him? If so, under what circumstances?

164. What effect has the cross-examination of a witness concerning matters not brought out on the direct examination of the witness?

166. (a) On the trial of an indictment against A for assault, A became a witness and was asked on cross-examination whether he had not assaulted another party at another time. An objection to the question was overruled. Was that error?

(b) On the trial of an indictment against A for larceny, X, who became a witness for A, was asked on cross-examination whether he, X, did not live with a woman who kept a house of ill-fame. Was the question objectionable? If so, why? If not, why not?

(c) A witness for the plaintiff testifies on cross-examination that he, the witness, never threatened revenge against the defendant. May the defendant's counsel contradict the witness on that point by other testimony?

167. Why will a court sometimes recognize the existence of a fact without proof of the existence thereof?

169. (a) Will the courts of Illinois take judicial notice of the public laws of Michigan? If so, why? If not, why not? (b) In an action by A against B, the fact of the average height of the human body became material. Was proof of that fact necessary? If so, why? If not, why not?

171. What is a presumption?

172. What effect has a presumption in the conduct of a legal proceeding?

173. A mill-dam has been maintained on A's property continuously for more than sixty years. What so-called conclusive presumption affecting the rights of all riparian owners above the dam arises from these facts?

174-175. In what two senses is the phrase "burden of proof" used?

176. Define the phrase "burden of proof" in its proper sense.

177. A sues B to recover for services rendered. B answers that the services were rendered pursuant to special contract and that the price therefor as fixed by the contract has been paid. Upon whom is the burden of proof?

180. What effect has a presumption on the burden of proof?

181. What is the difference between confessions and admissions?

182. What peculiar probative value has an admission?

184-185. What is the difference between solemn and unsolemn admissions?

186. When are admissions conclusive?

188. In an action against a common carrier to recover the value of a parcel alleged to have been lost by the defendant, the plaintiff offers to show statements made by the defendant's station master to a police officer, suggesting that the parcel had been stolen by a porter employed on the defendant's train. Is the evidence admissible?

191. How is it decided whether a question is a question of law or a question of fact?

192. By whom are all questions of law decided? What questions of fact must the court decide?

193. What is a general verdict? What is a special verdict?

194. Under what circumstances may a court withdraw a case from the jury and decide the matter itself?

QUIZ QUESTIONS

LAW OF ATTACHMENT AND GARNISHMENT

(The numbers refer to the numbered sections in the text.)

1-2. Define attachment and give an account of the origin of each kind.

3. How are attachment laws construed by the courts?

5. In what character of action may a plaintiff resort to attachment?

6-7-8. For whom and against whom may the remedy be used?

9. What are the three general classes into which the grounds of attachment may be divided?

10. State the principle upon which the right of attachment against the property of non-resident debtors rests.

11. A resides in one county but carries on a mercantile business in another county of the same state, to which he has never gone. He is indebted to B for services rendered in the business. During A's absence in another state to which he has gone to purchase goods, may B maintain attachment in the county where the business is conducted?

12. What is the character of fraud on the part of a debtor in disposing of his property that will justify attachment?

14. On what principle is based the right of a creditor to attach the property of a debtor who without fraudulent purpose is removing his property from the state?

15. A, while engaged in business as a retail merchant, made an untrue statement in writing to a commercial agency for the purpose of obtaining a false rating. He afterwards applied to B, a wholesale merchant, for the purchase of a large amount of goods on credit. B sold and delivered the goods upon a report of the commercial agency based upon

A's false statement. May attachment be sustained against A, he never having made representations to B touching his financial condition?

16-18. State the essential allegation in an affidavit for attachment.

19. In the trial of an attachment case, the evidence failed to show that the defendant had within two years made a fraudulent transfer of his property, as charged in the affidavit, but did show that he was about fraudulently to dispose of it, a sufficient ground, but one not charged. How may the plaintiff avail himself of the evidence?

20. What is the purpose of requiring the plaintiff to give bond before suing out a writ of attachment?

21. A and B are indebted to C on a joint obligation. There is an existing cause for attachment against A but none against B. C sues A and B on the joint obligation and desires to proceed in attachment. Who should be made parties to the bond?

22-23. How should an attachment bond be executed?

25-26. What are the duties of the officer regarding a writ in attachment: with reference to personal property; with reference to real property?

28-30. What is the duty of the officer with reference to possession of personal property?

31. What is his duty with reference to perishable property?

32-33. What is the difference between a forthcoming bond and a dissolution bond so far as such bonds relate to proceedings in attachment?

34-35. Explain the difference between personal service and service by publication.

37. In a suit brought by A against B the sheriff levied upon and took possession of personal property. The only service was by publication. After proof of service had been made but prior to the day set for hearing of the cause, the attached property was destroyed by fire. May the court proceed with a hearing and enter judgment?

38. What duty devolves upon the plaintiff other than making affidavit, filing bond and seeing that a writ is issued and levied upon the property?

39. A plaintiff, who has obtained service upon the defendant

by publication only and has charged as ground for attachment the fraudulent disposition of property, shows upon hearing a clear cause of action against the defendant but fails to show the fraudulent disposition of property. What should the judgment be?

40. If the defendant in an attachment proceeding appear, what two lines of defense may he interpose?
41. How may the issue on the attachment be raised?
42. In an attachment proceeding between A and B, C, not named in the proceedings at all, claims the property which has been attached by the sheriff. In what manner should he assert his claim?

43-46. What amendments are allowed: first, to the affidavit, second, to the bond, third, to the writ?

48-49. State some ground on which dissolution of the attachment may be obtained.

52. What is the effect of an order of the court dissolving an attachment?
53. In a case where the defendant has been personally served and levy has been made upon his property, what should be the order of the court, the plaintiff being successful, as to the defendant and as to the property levied upon?
54. What liability does the officer incur who fails promptly to advertise and sell property which has been adjudged liable to attachment?
55. Define garnishment.
56. How is it distinguished from attachment?

57-58. What are the two kinds of garnishment? Give an example of each.

59. Who may be made garnishees?

60-61. In what two respects may a party be held liable as a garnishee?

62. In a suit by A against B, C is summoned as garnishee and answers that he has funds belonging to B which he has received from X for the purpose of paying off a mortgage upon B's land to D. Should he be held as garnishee?

63-64. A, a receiver appointed to wind up the affairs of an insolvent corporation, answers as garnishee that he holds funds realized from the sale of personal property which he will report to the court. Why is he not liable, the evi-

dence showing that the defendant is a creditor of the corporation?

65. What is the basis of the garnishee's liability to the plaintiff?

66-67. A, summoned as garnishee in the suit of B against C, answers that he is in debt to C, but the obligation requires services of himself and team for one month. Is he liable?

68. What is the general rule with reference to making the maker of a promissory note liable as garnishee?

69. What is the prevailing rule with reference to reaching partnership credits by garnishment to pay the individual debt of a member of the firm?

70-71. State the leading essentials required in an affidavit for a garnishee summons.

72. What is the purpose of requiring a bond before the issuance of a garnishee writ?

73-74. What are the essentials of a summons in garnishment and by whom may it be served?

76. How may a defective affidavit, writ, bond or officer's return be cured?

77. Explain the two methods under which the garnishee may answer. What is his duty as to disclosing the facts?

78. How should a corporation summoned as a garnishee make answer?

79-80. What protection is extended to the garnishee in answering interrogatories?

81. Where the plaintiff is of the opinion that the garnishee has not truly answered, how may the truthfulness of the answer be tested?

82. Where the garnishee admits a debt due to the defendant, when will the court render judgment against the defendant, and when will he defer judgment?

83. What are the rights of the defendant in the trial of an issue as to the truthfulness of the garnishee's answer? How may a third party claiming a fund or property in the hands of a garnishee have his rights determined?

84. What is the effect of a refusal or neglect upon the part of the garnishee to answer?

85. What is the limit of a judgment against a garnishee as to amount?

QUIZ QUESTIONS

LAW OF JUDGMENTS AND EXECUTIONS

(The numbers refer to the numbered sections in the text.)

1. Define the judgment and distinguish it from the other things done by the court in the progress of the case.

2-3. Name six fundamental indispensables of jurisdiction and illustrate each.

4. (a) The judge being sick, the parties agreed that a lawyer present should sit as judge. He heard and decided the case. May execution issue thereon?

   (b) To ejectment claiming title as heir of B, defendant showed title as purchaser at a sale ordered and confirmed by the probate court of a Confederate state during the Rebellion. Is that a defense?

5. A claim for injuries from defective sidewalks was presented to the city council and denied, whereupon suit was brought, to which the city pleaded the order of the council in bar. Is the plea good?

6. It develops that the judge who decided a case is the brother of defendant's wife. Is the judgment void? If so, how is the defense available?

7. Is a plea in avoidance of a judgment that the supposed judgment was rendered on Sunday, a good defense?

8. Is a plea that the justice rendering the judgment heard and decided the case at a place outside of his regular office, and where he had never before held court, a good defense to an action on a judgment? Why?

9. To a bill for divorce on the grounds of adultery, defendant pleaded that before the alleged adultery defendant had obtained a divorce from plaintiff. On the trial it appeared

that in the suit in which such divorce was obtained no ground for divorce was alleged or proved, and that present plaintiff was by fraud persuaded not to make defense. Is the court bound by the prior decree?

10-11. What would be the result if, when a prior decree was offered in evidence, the judge were not bound by that decree?

12-14. (a) In ejectment defendant showed title by sale under execution on a judgment recovered in an action in which process was served on the defendant therein by publication and by service on him personally in another state. Is the title good, and why?

(b) Would it be material that such judgment was rendered after trial in which defendant made defense, or by an appellate court after such defense without further service of process on defendant therein?

15. Is a law constitutional which provides that process to sue any corporation, domestic or foreign, may be commenced by service on the secretary of state of the state without further service on the corporation or any of its officers? Why?

16. In a suit to recover money due, is it a defense that the defendant has already been compelled to pay the amount in a suit in which he was summoned as garnishee in another state, where the present plaintiff was not served and did not defend? Why?

17. In an action to quiet title, plaintiff prayed that defendants' title be decreed null and void. The decree was that plaintiff had absolute title. This decree is set up as defense to ejectment by A's wife. Is it a defense, she having been a defendant in the prior suit? Why?

20-21. To a suit to collect a judgment rendered on an assessment on a drainage tax, it is pleaded that the petitioners for the ditch were not of the number required by law, were not all freeholders, and some were not citizens. Should the defense be sustained, and why?

22-24. Defendant asks the court to correct a record of judgment against him by cancelling the entry that he pay the costs to be taxed. Can the judge order such cancellation if the judgment is three years old and there is nothing but the unsupported recollection of the judge to dispute the clerk's entry?

25. To suit on a judgment, defendant offered to show that he was not served with process therein, did not appear, knew nothing of it, that the attorney who purported to have appeared for him was unauthorized to appear and in fact did not appear. Plaintiff objected to admission of such evidence, on the ground that the record stating such service was the only proper proof. Was the evidence competent, and why?

26-27. The court ordered judgment for the plaintiff for $300, Friday at 4 p. m. Court did not sit again till Tuesday, which was the first day of the new term. At the opening of the court plaintiff asked the court to add interest on the allowed item, amounting to about $100. The judge said he had intended to do so but forgot it, and then ordered the other $100 added to the judgment. Is such order valid, and why?

28. What is the effect of a judgment on the merits on subsequent suits for the same cause?

29. I have several tax deeds against your land, I sue on one of them and fail, then sue on another, and you plead the first suit and judgment in bar. Is the plea good? How would it be if the first suit had been by you against me and I had merely set up the first deed as defense and failed?

30. You sue me for the price of a wagon and get judgment, which you set up as a defense to my action for damages for breach of warranty, in that the wagon broke down from secret defects before you sued. Is your judgment a defense?

31. Can I avoid certain judgments against me by showing that these judgments were obtained by bribing my witnesses not to appear or testify for me?

32. Distinguish a non-suit from a retraxit. May it be proved by parol that a judgment on general denial was in fact rendered because the suit was prematurely brought?

33. Distinguish bar from estoppel. Which is the broader?

34-35. (a) Is the former judgment an estoppel if one of the present defendants was not party to the former suit?
(b) What if he was one in whose interest the suit was prosecuted, but was not named as a party?

36. Can a defense be made to the new action that might have been made to the old but was not set up?

37. Defendant pleads three several pleas, and a general verdict is rendered in his favor. To a new action on another cause two of these pleas are good defenses, and he pleads the former judgment as an estoppel. Is the defense good?
38. Is a judgment for defendant in a criminal action by the government for cutting timber on government land, in which the defendant pleads not guilty, a defense to an action by the government for damages for the same trespass? Why?
39. Is the decree of the probate court denying a claim against the estate because of a deed of settlement made by the parties, a defense to a bill in chancery to have such deed set aside for fraud and defendant called to account? Why?
40. I buy a piece of land but do not record my deed, and you sue the person having the title of record to quiet the title. Is that decree binding on me if my title was derived through him?
41. What is essential to bar unborn persons by a judgment?
42. Is an order appointing Jane administratrix of the estate as surviving widow, an estoppel against the claim of Mary to dower as widow, and why?
43. Judgment is rendered for plaintiff in replevin, but without damages or costs. What is the appropriate execution?
44. If the judgment had been for plaintiff, including damages and costs, what would have been the proper writ?
46. Under a statute declaring judgments a lien on land for a year if execution is issued within that time, plaintiff obtained a writ from the clerk of the court, addressed it to the sheriff to be executed, and deposited it in the post-office on the last day of the year. The sheriff obtained it in the mail next morning. Does the lien continue?
47. To an action against the sheriff for the amount of a judgment on which he had received execution and returned it unsatisfied, he pleaded that defendant died the day before he received the writ, and plaintiff demurred. Does the action lie?
48-49. (a) How do you determine whether an execution is in the proper form, and the effect if it is not?
(b) From what court does execution issue?
50. To an action by an assignee of a judgment against the sheriff for not collecting, he pleaded that the judgment

creditor ordered him not to levy. Is it a good defense, and why?

51. On execution against A, the sheriff seized the horse of B, who replevined it. Is the suit maintainable, and why?
52. On trover against a sheriff for wrongful levy, the plaintiff in the execution defended the action for the sheriff, but judgment was recovered and paid. Can the sheriff recover the amount thus paid from the plaintiff?
53. A special deputy was appointed to levy execution. He went to a warehouse at night, broke in without asking for admission of anyone, took butter from the warehouse and sold it on the writ, for which the defendant sued him in trover. He set up the writ as a justification. Is it a defense?
54. A sheriff sold goods after returning the writ on which the levy was made, and without receiving any new authority. Did title pass?

QUIZ QUESTIONS

LAW OF EXTRAORDINARY REMEDIES

(*The numbers refer to the numbered sections in the text.*)

1. Name and define five extraordinary remedies at common law.
2. To what extent, if at all, will courts of equity recognize and enforce these remedies?
3. Does the maxim, "He who comes into equity must do so with clean hands," apply in the enforcement of extraordinary remedies? If so, to what extent and under what circumstances?
4. To invoke the doctrine of laches, is it always necessary that the defendant prove that the Statute of Limitations has barred the claim?
5. What was the origin of the writ of mandamus?
6. What were the origin and purpose of the writ of prohibition, and to what extent and to what uses is it now put?
7. State the origin, purpose, and effect of the writ of certiorari.
8. In a proceeding quo warranto, to whom would you apply for leave to file the writ, and what would be the effect of such application, if granted?
9. A is arrested without sufficient warrant or other legal proceedings. Can he avail himself of the habeas corpus as a remedy?
10. Distinguish between the rules governing the issuance of writs of right and of writs, the granting of which rests primarily in the discretion of the court.
11. The defeated party in a suit at law, having complied with the rules of court, demands of the clerk that he prepare the common law record; this the clerk, without lawful ex-

cuse, refuses to do. What remedy has the demandant to procure the record?

12. A, a married woman, has been placed in an insane asylum by her husband. May B, her brother, file a petition for habeas corpus on her behalf?
13. A taxpayer seeks a writ of mandamus to compel the county treasurer to extend the taxes upon property similarly situated and as against other owners. Whom should he make parties defendant?
14. Petition for habeas corpus is filed; you represent the sheriff. What would your first pleading be, if upon examination you found the petition insufficient upon its face?
15. The court, upon full consideration, awards a writ of mandamus. What order should the record then show?
16. Plaintiff brings an action and secures judgment. If such judgment may be reviewed upon appeal, will the writ of prohibition lie?
17. Distinguish between the cases in which the state and the cases in which the individual may pursue the extraordinary remedies.
18. If there be any other available and adequate remedy, under what circumstances, if at all, will the writ of mandamus lie?
19. Under what circumstances, if any, will a court of equity interfere to prevent the issuance of a writ of mandamus?
20. To what extent may the court exercise discretion in granting these writs, and how far are the parties bound by the exercise thereof?
21. An issue of fact is presented; the defendant demands trial by jury. Should such demand be complied with?
22. A writ of mandamus is refused; the defendant asks the court to tax costs in his behalf. Ought the court to do so?
23. In a general way, state what courts have jurisdiction to issue these extraordinary writs.
24. In event that a constitutional question is involved, may the district court of the United States issue a writ of habeas corpus?
25. The jurisdiction of the supreme court of a certain state is in part original. Can such court entertain a petition for habeas corpus?

26. May a state court of general jurisdiction issue a writ of prohibition to a district court of the United States?
27. A public service corporation refuses to perform a plain duty. What is the remedy of one specifically injured by such refusal?
28. Will mandamus lie against a superior officer holding his office by virtue of election and performing political duties only?
29. Under what circumstances, if any, may the federal courts issue writs of mandamus against state courts or their officers?
30. A is actually discharging the duties of the office of justice of the peace; B claims that he himself was duly elected to such office and seeks to oust A. What is his proper remedy?
31. Distinguish between the duties enforcible by mandamus — that is, between those judicial, those ministerial, and those only obligatory.
32. A court exceeds its jurisdiction regarding the person and also the subject matter. Can the injured party obtain a writ of prohibition?
33. Will a writ of prohibition lie to restrain a purely ministerial officer from the performance of certain of his legal duties?
34. What is the purpose of a writ of certiorari and under what circumstances may it be sued out?
35. Will the writ of certiorari lie to review the action of other than judicial bodies?
36. Upon consideration of the writ of certiorari, what questions will come before the court for determination?
37. To what extent, if at all, will quo warranto lie to compel the officers of municipal corporations to perform their duties as such?
38. Under what circumstances, if any, will an information for quo warranto lie against corporations other than municipalities?
39. Distinguish between powers, licenses, franchises, and easements in so far as quo warranto applies to each of them?
40. Will the writ of quo warranto lie to oust an officer of a public corporation? If not, why not?
41. Under what circumstances, if any, will the writ of quo warranto lie to oust officers of private corporations?

42. One having, upon the face of the returns, been elected to a public office, can the court, upon information filed, go behind the returns to ascertain the facts?
43. A holds office under the federal government. Will an information in the nature of quo warranto lie to question his right to such office?
44. Under what circumstances may a court of equity grant substantially the same relief as can a court of common law, in quo warranto proceedings?
45. A writ of habeas corpus issues; the petitioner is brought into court by the sheriff; he disappears from the court room. Is the sheriff liable as for an escape?
46. Under what circumstances, if any, will the federal courts entertain a writ of habeas corpus to relieve from the wrongful acts of state courts?
47. In what instances will the federal courts issue writs of habeas corpus? What is the basis of such action?
48. A state legislature causes the imprisonment of a person as for contempt. What jurisdiction, if any, has the supreme court of such state to inquire into the legality of the imprisonment?
49. If A be convicted by the judgment of an inferior court, will a superior court ever grant him relief by way of habeas corpus?
50. Where errors appear upon the face of the record and the prisoner has not lost his right to have such errors reviewed, can he do so by writ of habeas corpus?
51. A mittimus is issued against Jones; it is insufficient on its face; Jones sues out a writ of habeas corpus. Ought he to be discharged?
52. A ministerial officer makes a finding of fact. To what extent, if any, will the courts review this finding upon habeas corpus?
53. Under what circumstances, if any, and by what authority may the writ of habeas corpus be suspended?
54. Has the United States Congress power to suspend the writ of habeas corpus under any circumstances?
55. A state suspends the writ of habeas corpus. Can the federal government interfere to restore the right?

QUIZ QUESTIONS

LAW OF HABEAS CORPUS

(The numbers refer to the numbered sections in the text.)

1. (a) Define the writ of habeas corpus. (b) What portion of the law of habeas corpus is covered by the definition?
2. (a) Why is the writ of habeas corpus called a "prerogative writ"? Why is it called an "extraordinary writ"? Why is it called a "writ of right"? (b) What are the terms of the guaranty of personal liberty contained in Magna Charta?
3. (a) What is the purpose of the writ which is known by the general name of habeas corpus and which is technically styled "habeas corpus ad subjiciendum et recipiendum"? (b) What is the object of the writ known as "habeas corpus ad testificandum"?
4. (a) What is the origin of the writ which is the subject of this article? In early days to what uses was it restricted? (b) In connection with our subject, what was one of the grievances recited by the Declaration of Independence?
5. What is the logical method of ascertaining what imprisonment is illegal?
6. Make a statement in classified form of the limitations on the right of personal liberty.
7. The state constitution restricted the criminal jurisdiction of the city court to the trial of misdemeanors. Alfred Barnes was brought to trial before this court on a charge of arson. The jury found him guilty and he was sentenced to ten years in the state prison where he now is. He wants to know if he can secure a writ of habeas corpus on these facts.
8. The sheriff, having a warrant for the arrest of a notorious desperado who is hiding in the mountains, orders A to join him and assist in the capture, and threatens A with arrest

if he refuses. A submits, but as there is a prospect that he may be obliged to serve several days, he applies for a writ of habeas corpus. Is he entitled to it on these facts?

9. A was ill at his home and his physician reported the case to the Board of Health as smallpox. The Board sent their own physician to see the patient and he confirmed the report. Thereupon, by order of the Board, A was forcibly taken from his home and was confined in the county hospital for contagious diseases. The question is, will the writ of habeas corpus avail to release him?

10. In a general way, what is the state of the law in this country with regard to imprisonment for debt?

11. A and B were husband and wife. B announced her fixed intention of going on the stage. Remonstrances proving of no avail, A locked his wife up and refused to release her until she abandoned her intention. B's brother discovered her predicament and applied for a writ of habeas corpus directed to A. Was the issuance of the writ justified on these facts? The facts being admitted by A on the return of the writ, was B entitled to be released?

12. A boy twelve years of age, for a slight act of disobedience, was chained to the bed by his drunken father and was kept there for two weeks on bread and water. The agent of the S. P. C. C. heard of the case and he applied for and obtained a writ of habeas corpus. The father made return, claiming the right to confine the boy by virtue of parental authority. When produced in court, the boy was emaciated and covered with sores. What action should the court have taken?

13. Suppose that a child whose parents were dead and who had a guardian were kidnapped by his aunt who was anxious to adopt him and bring him up. Could the guardian regain the custody of the child by means of habeas corpus?

14-15. (a) A boy of eighteen years of age is "indentured out" as an apprentice for ten years and upon reaching his majority he concludes not to work for the master any longer; but the master refuses to release him and forcibly restrains him. Will habeas corpus avail to release the boy contrary to the terms of the deed? (b) A, being of age, contracts to work for B for a year. He works a week and

then throws up his job and goes to work for C. Can B secure the custody of A by means of a writ of habeas corpus directed to C in order to compel A to work out his contract?

16. A has secured a divorce from his wife, B. The court awarded the custody of their only child to the father who placed him in a boarding school. B kidnapped the child. Could the head master of the school regain custody of the child by means of habeas corpus?
17. A is charged with crime in Chicago and is admitted to bail, B going on the bail bond. A then went to New York and immediately B, fearing that A was going to jump his bail, hired a couple of men and went to New York and arrested A and started with him for Chicago, intending to surrender him to the authorities. Upon these facts would a New York court release A on habeas corpus?
18. What constitutes a restraint?
19. Adultery is not a crime at common law. The legislature makes it a crime and declares that the statute shall apply to acts of adultery committed prior to the statute. A is arrested charged with adultery committed prior to the statute. Can he have habeas corpus?
20. A city ordinance established a public market and made it an offense punishable by imprisonment to sell meat within the city limits outside of the public market. The charter gave no power to regulate markets. Could a man who was arrested for violation of the ordinance obtain release by means of habeas corpus?
21. Is habeas corpus a proper remedy where a man has been sentenced to imprisonment without due process of law? Give an example of such a sentence.
22. A man was on trial for burglary and his defense was an alibi. Against the prisoner's objection the court permitted the state to introduce evidence tending to show that the prisoner had been guilty of other burglaries. Conviction and sentence to ten years' imprisonment followed. What is the prisoner's remedy? Explain fully.
23. In a state in which the common law right of trial by jury was "forever preserved inviolate," in a murder trial, the judge, finding that the jury could not agree, accepted a

majority verdict of guilty and sentenced the prisoner to imprisonment for life. Would habeas corpus avail him?

24. Who may apply for the writ of habeas corpus?
25. What is the petition for the writ of habeas corpus required to make out?
26. What does the writ of habeas corpus command?
27. What is the technical term applied to the one to whom the writ of habeas corpus is directed? What is his answer called? What happens if he takes no notice of the writ after it has been served on him?
28. A warden was served with a writ of habeas corpus requiring him to produce a certain prisoner in court the following morning. That night the prisoner escaped and at the hour of return was still at large. What should the court do?
29. How is obedience to the writ of habeas corpus enforced?
30. Under what circumstances may the privilege of the writ of habeas corpus be suspended?

TABLE OF CONTENTS

LEADING ILLUSTRATIVE CASES

(The figures refer to those at the foot of the pages. All Leading Illustrative Cases cited in the text are included in the following chapters.)

PLEADINGS IN CIVIL ACTIONS—AT COMMON LAW AND UNDER MODERN STATUTES

CHAPTER I.

NECESSITY OF PLEADING AND IMPORTANCE OF SUBJECT.

TITLE OF CASE	PAGE
McFaul v. Ramsey	717

CHAPTER IV.

COMMON LAW CAUSES OF ACTION.

Metcalf v. Robinson	721
United States v. Colt	723
Abbott v. McCartney	731
Simmons v. Spencer	734
Emigh v. Pittsburgh, Fort Wayne and Chicago Railroad Company	737
Ricketts v. Dorrel	739

CHAPTER V.

PROCEEDINGS IN OTHER COURTS AND EFFECT OF THE CODE ON FORMS OF ACTIONS.

TITLE OF CASE PAGE
Getty v. Hudson River Railroad Company..... 743
Supervisors of Kewaunee County v. Decker..... 745
Anderson v. Caldwell..... 747

CHAPTER VI.

PARTIES TO ACTIONS AND JOINDER OF ACTIONS.

Garland v. Davis..... 750

CHAPTER VIII.

THE DEFENSES TO AN ACTION AND THE DEFENDANT'S PLEADINGS AND RULES GOVERNING THEM.

Brown v. Duchesne..... 756
State ex rel. Barrell et al. v. Christman et al..... 756

CHAPTER IX.

THE PLAINTIFF'S SECOND PLEADING, THE CLOSING OF THE ISSUES, AND JUDGMENT.

Clearwater v. Meredith..... 762

LAW OF EVIDENCE

PART I

RULES OF EXCLUSION

CHAPTER II.

UNIMPORTANT, MISLEADING, AND PREJUDICIAL MATTERS.

TITLE OF CASE — PAGE

Columbia, etc., Railroad Company v. Hawthorne..... 765

CHAPTER IV.

CONFESSIONS.

Roesel v. State..... 770

CHAPTER V.

HEARSAY.

Bacon v. Towne et al..... 775

CHAPTER VI.

EXCEPTIONS TO THE RULE AGAINST HEARSAY.

Mattox v. United States..... 776
Evanston v. Gunn..... 779
Pratt v. White..... 781
The Mayor, etc., of New York v. The Second Avenue Railroad Company 783
Williams v. Great Northern Ry. Company..... 787
Waldele v. The New York Central & H. R. R. R. Company. 791

CHAPTER VII.

OPINION.

TITLE OF CASE PAGE
Connecticut, etc., Insurance Company v. Lathrop..... 799

PART II

FORMS IN WHICH JUDICIAL EVIDENCE MAY BE PRESENTED

CHAPTER IX.

DOCUMENTS.

Brigham v. Palmer..... 807
Goodrich v. Weston..... 809
Kellogg v. Thompson..... 811

CHAPTER X.

WITNESSES.

Foster v. The People..... 813

PART III

TOPICS RELATING TO THE LAW OF EVIDENCE

CHAPTER XI.

JUDICIAL NOTICE.

Hanley v. Donoghue..... 818

CHAPTER XII.

PRESUMPTIONS.

Moore v. New York, etc., R. R. Company..... 824

LEADING ILLUSTRATIVE CASES PLEADINGS IN CIVIL ACTIONS—AT COMMON LAW AND UNDER MODERN STATUTES

CHAPTER I.

NECESSITY OF PLEADING AND IMPORTANCE OF SUBJECT.

System of Common Law Pleading Must Be Retained.

McFAUL v. RAMSEY.

20 How. 523 (U. S.). 1857.

This case was brought up, by writ of error, from the district court of the United States for the district of Iowa.

The case is stated in the opinion of the court.

GRIER, J., delivered the opinion of the court.

Ramsey, the plaintiff below, instituted this suit in the district court of the United States for the district of Iowa. The parties of that court have been permitted to frame their pleadings, not according to the simple and established forms of action in courts of common law, but according to a system of pleadings and practice enacted by the state to regulate proceedings in its own courts. The code commences by abolishing "all technical forms of actions," prescribing the following curt rules for cases, whether of law or equity:

"Any pleading which possesses the following requisites shall be deemed sufficient:

"1st. When to the common understanding it conveys a reasonable certainty of meaning.

"2d. When by a fair and natural construction it shows a substantial cause of action or defense.

"If defective in the first of the above particulars, the court, on motion, will direct a more specific statement; if in the latter, it is ground of demurrer."

If the right of deciding absolutely and finally all matters in controversy between suitors were committed to a single tribunal, it might be left to collect the nature of the wrong complained of, and the remedy sought, from the allegations of the party ore tenus, or in any other manner it might choose to adopt. But the common law, which wisely commits the decision of questions of law to a court supposed to be learned in the law, and the decision of the facts to a jury, necessarily requires that the controversy, before it is submitted to the tribunal having jurisdiction of it, should be reduced to one or more integral propositions of law or fact; hence it is necessary that the parties should frame the allegations which they respectively make in support of their demand or defense into certain writings called pleadings. These should clearly, distinctly, and succinctly state the nature of the wrong complained of, the remedy sought and the defense set up. The end proposed is to bring the matter of litigation to one or more points, simple and unambiguous. At one time, the excessive accuracy required, the subtlety of distinctions introduced by astute logicians, the introduction of cumbrous forms, fictions, and contrivances, which seemed only to perplex the investigation of the truth, had brought the system of special pleading into deserved disrepute, notwithstanding the assertion of Sir William Jones that "it was the best logic in the world, except mathematics." This system is said to have come to its perfection in the reign of Edward III. But in more modern times it has been so modified by the courts, and trimmed of its excrescences, the pleadings in every form of common-law action have been so completely reduced to simple, clear, and unambiguous forms, that the merits of a cause are now never submerged under folios of special demurrers, alleging errors in pleading, which, when discovered, are immediately permitted to be amended. This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative om-

nipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of action for different wrongs requiring different remedies lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts.

The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice. In the case of Random v. Toby, 11 Howard 517, we had occasion to notice the operation of a code similar to that of Iowa. In a simple action on a promissory note, the pleadings of which, according to common-law forms, would not have occupied a page, they were extended to over twenty pages, requiring two years of wrangle, with exceptions and special demurrers, before an issue could be found between the parties. In order to arrive at the justice of the case, this court was compelled to disregard the chaos of pleadings, and eliminate the merits of the case from a confused mass of fifty special demurrers or exceptions, and decided the cause without regard to these contrivances to delay and impede a decision of the real controversy between the parties. In the case of Bennet v. Butterworth, 11 Howard 667, originating under the same code, the court was unable to discover from the pleading the nature of action or remedy sought. It might, with equal probability, be called an action of debt, or detinue, or replevin, or trover, or trespass, or a bill in chancery. The jury and the court below seem to have labored under the same perplexity, as the verdict was for $1,200, and the judgment for four negroes. In both these cases this court has endeavored to impress the minds of the judges of the district and circuit courts of the United States with the impropriety of permitting these experimental codes of pleading and practice to be inflicted upon them. In the last mentioned case, the chief justice, in delivering the opinion of the court, says: "The constitution of the United States has recognized the distinction between law and equity, and it must be observed in the federal courts." In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. But in those states where the courts of the United States administer the common law, they

cannot adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either.

We have made these few introductory remarks before proceeding to notice the merits of the controversy, as developed by the record, in order that the bar and courts of the United States may make their records to conform to these views, and not call upon us to construe new codes and hear special demurrers or pleadings which are not required to conform to any system founded on reason and experience. To test such pleadings by the logical reasoning of common law, after requiring the party to disregard all forms of action known to the law under which he seeks a remedy, would be unreasonable and unjust.

The plaintiff's petition sets forth his grievance in plain, intelligible form, if not with technical brevity and simplicity. * * *

The cavils to the sufficiency of the plaintiff's statement, under the name of a special demurrer, were overruled by the court below, and justly, because the code permits a demurrer only when the petition, "by a fair and natural construction does not show a substantial cause of action." As we have already shown, it contains a dozen.

The judgment of the court below is affirmed, with costs.

CHAPTER IV.

COMMON LAW CAUSES OF ACTION.

Assumpsit.

METCALF v. ROBINSON.

2 McLean 363 (U. S. Cir. Ct.). 1841.

Circuit Court, D. Indiana. May term, 1841.

McKinney and Gookins, for plaintiff. Mr. Lockwood, for defendant.

Opinion of the Court. This action was brought on a bill of exchange for $627.33, drawn by the plaintiff on the defendant, accepted by him and protested for non-payment. The first count of the declaration complains, etc., of a plea that the defendant render unto the plaintiff $1,000, which he owes and unjustly detains from him. For that whereas, etc., setting out the bill, its acceptance and protest for non-payment. And that the plaintiff, as drawer, was forced and obliged to pay the holder, etc., of which the defendant had notice, "by means whereof said defendant then and there became liable to pay said plaintiff said sums of money; and being so liable, he, the said defendant, then and there undertook and promised to pay," etc.

The second count states that the defendant was indebted to the plaintiff for so much money, etc., had and received to and for the use of the plaintiff at defendant's request. And, also, in the further sum of $700 for money laid out and expended, etc., and, being so indebted, he, the said defendant, in consideration thereof, then and there undertook and promised to pay to the said plaintiff said sums of money, when he, the said defendant, should be thereunto requested. Yet the said defendant has refused, etc., to the damage of the said plaintiff $200.

To this declaration the defendant demurred, and assigned as cause of demurrer a misjoinder, the first count being in debt and the other in assumpsit.

The forms of a declaration in an action of indebitatus assump-

sit, and in debt on simple contract, are very similar. There are, however, certain words by which they are distinguished, and which give the one or the other character to the action. The action of debt is founded upon the contract, the action of assumpsit upon the promise, and in this consists the principal distinction between the two actions.

In the action of debt on simple contract, express or implied, the subject-matter of the debt should be described precisely as in the common counts of assumpsit. The consideration for the contract must be stated, as also any inducement necessary to explain the contract or consideration, and it should be stated the party agreed to pay. Stating that he promised to do so would be bad. Emery v. Fell, 2 Term R. 28; 2 Bos. & Pul. 78.

In the case of Brill v. Neele, 3 Barn. & Ald. 208, the record stated that the plaintiff had brought his bill, etc., in a plea of debt, and the commencement of the declaration was in the common form in debt. The first count then stated that defendant was indebted to the plaintiff for work and labor, etc., and being indebted, that the defendant undertook and promised to pay upon request, etc. The second count was upon a quantum meruit, and in form like the first. The other counts were properly framed in debt. To this declaration there was a demurrer, assigning for cause the misjoinder of debt and assumpsit. In support of the demurrer the case of Dalton v. 2 Smith, 618, was cited, where the court held a declaration containing counts precisely similar to be bad; and Lawrence, Justice, there said that the counts laid with a promise were counts in assumpsit without a breach.

There can be no doubt that in the case under consideration the counts were intended to be in debt. This is plainly seen from the general form and language of the counts. The damages are laid at the conclusion of the declaration, as in debt, in a less amount than the sum demanded. But in both counts it is alleged that the defendant, "in consideration thereof, undertook and promised to pay." This, under the above authority, makes the counts assumpsit. They are counts in assumpsit without a breach. The breach assigned in the last count, which lays the damages at $200, when the amount demanded is the sum of $1,000, is wholly irregular. Leave given to the plaintiff to amend his declaration.

Debt.

UNITED STATES v. COLT.

Peters C. C. 145 (U. S.). 1815.

This was an action of debt brought upon an embargo bond in the district court, in June, 1811, and the declaration demanded $20,000, which the defendant was alleged to owe and detain. It then recited the embargo law, laying the breach by the defendant, "whereby the United States are entitled to demand a sum not exceeding $20,000 and not less than $1,000, viz., $20,000," which it averred to be due to the plaintiffs and detained from them by the defendant. Upon nil debet pleaded, the jury found a verdict for $4,000. The defendant took out a writ of error, returnable at April sessions, 1812, of the circuit court; and the case now came on for decision.

WASHINGTON, J. The question in this case is whether the action is maintainable. The objection to the action of debt, where the penalty is uncertain, is that this action can only be brought to recover a specific sum of money, the amount of which is ascertained. It is said that the very sum demanded must be proved, and on a demand for thirty pounds you can no more recover twenty pounds than you can a horse on a demand for a cow. Blackstone says (3 Blackstone, Com., 154) that debt, in its legal acceptation, is a sum of money due by certain and express agreement, where the quantity is fixed and does not depend on any subsequent valuation to settle it; and, for non-payment, the proper remedy is the action of debt to recover the specific sum due. So, if I verbally agree to pay a certain price for certain goods and fail in the performance, this action lies, for this is a determinate contract. But if I agree for no settled price, debt will not lie, but only a special action on the case; and this action is now generally brought, except in cases of contracts under seal, in preference to the action of debt; because, in this latter action, the plaintiff must prove the whole debt he claims or recover nothing at all. For the debt is one single cause of action, fixed and determined, and which, if the proof varies from the claim, cannot be looked upon as the same contract of which performance is demanded. If I sue for thirty pounds I am not at

liberty to prove a debt of twenty pounds and recover a verdict thereon, for I fail in the proof of that contract which my action has alleged to be specific and determinate. But indebitatus assumpsit is not brought to compel a specific performance of the contract, but is to recover damages for its non-performance, and, the damages being indeterminate, will adapt themselves to the truth of the case as it may be proved, for if any debt be proved it is sufficient.

The doctrine laid down by this writer appears to be much too general and unqualified, although, to a certain extent, it is unquestionably correct. Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But it is not essential that the contract should be express or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated; to recover back money which a bailiff has paid more than he had received, and in a variety of other cases where the law, by implication, raises a contract to pay. 3 Com. Dig. 365. The sum may not be fixed by the contract, but may depend upon something extrinsic which may be averred; as, a promise to pay so much money as plaintiff shall expend in repairing a ship, may be sued in this form of action, the plaintiff averring that he did expend a certain sum. 2 Bac. 20. So, on promise by defendant to pay his proportion of the expenses of defending a suit in which defendant was interested, with an averment that plaintiff had expended so much, and that defendant's proportion amounted to so much. 3 Levy 429. So an action of debt may be brought for goods sold to defendant for so much as they were worth. 2 Com. Dig. 365. So debt will lie for use and occupation, where there is only an implied contract, and no precise sum agreed upon. 6 T. Rep. 63.

Wooddeson (3d vol. 95) states that debt will lie for an indeterminate demand which may be readily reduced to a certainty. In Emery v. Fell, 2 Term R. 28, in which there was a declaration in debt, containing a number of counts for goods sold and delivered, work and labor, money laid out and expended, and money had and received, the court on a special demurrer sustained the action, although it was objected that it did not appear that the demand was certain, and because no contract of sale

was stated in the declaration. But the court took no notice of the first objection, and avoided the second by implying a contract of sale from the words which stated a sale. These cases prove that debt may be maintained upon an implied as well as upon an express contract, although no precise sum is agreed upon. But the doctrine stated by Lord Mansfield in the case of Walker v. Witter, Doug. 6, is conclusive upon this point. He lays it down that debt may be brought for a sum capable of being ascertained, though not ascertained at the time the action was brought. Ashurst and Buller say that whenever indebitatus assumpsit is maintainable, debt is also. In this case two points were also made by the defendant's counsel; first, that on the plea of nil debet the plaintiff could not have judgment, because debt could not be maintained on a foreign judgment; and, secondly, that on the plea of nul tiel record judgment could not be entered for the plaintiff, because the judgment in Jamaica was not on record. The court were in favor of the defendant on the second point and against him in the first, by deciding that debt could be maintained on a foreign judgment, because indebitatus assumpsit might; and that the uncertainty of the debt demanded in the declaration was no objection to the bringing of an action of debt. The decision, therefore, given upon that point was upon the very point on which the cause turned. But, independent of the opinion given in this case, is it not true, to use the words of Buller, "that all the old cases show that whenever indebitatus assumpsit is maintained debt also lies."

The subject is very satisfactorily explained by Lord Loughborough, in the case of Rudder v. Price, 1 H. Black. 550, which was an action of debt, brought on a promissory note payable by instalments, before the last day of payment was past, in which the court, yielding to the weight of authority, rather than to the reason which governed it, decided that the action could not be supported, because the contract, being entire, would admit of but one action, which could not be brought until the last payment became due, although indebitatus assumpsit might have been brought. But his lordship was led to inquire into the ancient forms of action on contracts; and he states that in ancient times debt was the common action for goods sold and for work and labor done. Where assumpsit was brought it was not a general indebitatus assumpsit, for it was not brought merely on a prom-

ise, but a special damage for a non-feasance, by which a special action arose to the plaintiff. The action of assumpsit to recover general damages for the non-performance of a contract was first introduced by Slade's Case, which course was afterwards followed. In the case of Walker v. Witter, Buller also stated that till Slade's Case, T. 44 Eliz. 4 Co. 92 b, a notion prevailed that on a simple contract for a certain sum the action must be debt; but it was held in that case that the plaintiff might bring assumpsit or debt, at his election.

Thus, it appears that in all cases of contract, unless a special damage was stated, the primitive action was debt, and that the action of indebitatus assumpsit succeeded principally, I presume, to avoid the wager of law, which, in Slade's case, was one of the main arguments urged by the defendant's counsel against allowing the introduction of the action of assumpsit, as it thereby deprived the defendant of his privilege of wagering his law. Buller seems, therefore, to have been well warranted, in the case of Walker v. Witter, in saying that all the old cases show that where indebitatus assumpsit will lie debt will lie. The same doctrine is supported by the case of Emery v. Fell, 2 Term R. 30, which was an action of debt in which all the counts of indebitatus assumpsit are stated, where the objection to the doctrine was made and overruled. So, in the case of Harris v. Jameson, 5 Term R. 557, Ashurst refers with approbation to the opinion delivered in the case of Walker v. Witter. That debt may be brought for foreign money, the value of which the jury are to find, had been decided before the case of Walker v. Witter, as appears by the case of Rands v. Peck, Cro. Jac. 618; and in Draper v. Rastal the same action was brought, though in different ways, for current money, being the value of the foreign.

Comyns, in his Digest, title "Debt," page 366, where he enumerates the cases in which debt will not lie, states no exception to the rule that where indebitatus assumpsit will lie debt will lie, but one for the interest of money due upon a loan. But the reason of that is explained by Lord Loughborough in the case of Rudder v. Price, who states that until the case of Cook v. Whorwood, upon a covenant to pay a stipulated sum by instalments, if the plaintiff brought assumpsit, after the first failure, he was entitled to recover the whole sum in damages; because he could not in that form of action, any more than in the action of debt,

support two actions on an entire contract. Until that decision the only difference between debt and assumpsit, in such a case, was that the former could not be brought until after the last instalment was due; in the latter, though it might be brought after the first failure, yet the plaintiff might recover the whole, because he could not maintain a second action on the same contract.

I proceed with the doctrine of Judge Blackstone before stated. After stating what constitutes debt, he observes "that the remedy is an action of debt to recover the special sum due." It is observable that he does not say that the plaintiff is to recover the sum demanded by his declaration, and no person will deny but that he is to recover the special sum due.

After stating what constitutes a debt and prescribing the remedy, Judge Blackstone proceeds to the evidence and recovery and says, "the plaintiff must prove the whole debt he claims, or he can recover nothing." On this account he adds, "the action of assumpsit is most commonly brought, because in that it is sufficient if the plaintiff prove any debt to be due, to enable him to recover the sum so proved in damages." If this writer merely means to say that, where a special contract is laid in the declaration, it must be proved as laid, the doctrine will not be controverted.

If debt be brought on a written agreement the contract produced in evidence must correspond, in all respects, with that stated in the declaration, and any variance will be fatal to the plaintiff's recovery. Such, too, is the law in all special actions in the case; but if Judge Blackstone meant to say that, in every case where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing, he is opposed by every decision, ancient and modern. The old cases before mentioned, in which debt was brought and sustained, are all cases where it is impossible to suppose that the sum stated in the declaration was or could in every instance be proved, any more than it is or can be proved in actions of indebitatus assumpsit. They are in fact actions substantially like to actions of indebitatus assumpsit in the form of action for debt. The action of debt for foreign money is and can be for no determinate sum, because the value must be found by the jury, either upon the trial of the issue or upon a

writ of inquiry where there is judgment by default. Randall's Peake.

The case of Sanders v. Mark is debt for an uncertain sum, in which the debt claimed was for fifteen pounds, eighteen shillings and six pence, and the defendant's proportion of the whole sum was averred to be fifteen pounds, eighteen shillings and eight pence; yet the action was supported. This is plainly a case where the sum due could not be certainly averred, because the yearly value of the defendant's property might not be known to the plaintiff and could only be ascertained with certainty by the jury. In the case of Walker v. Witter, Lord Mansfield is express upon this point. He says that debt may be brought for a sum capable of being ascertained though not ascertained at the time of bringing the action; and he adds that it is not necessary that the plaintiff should recover the exact sum demanded. In the case of Rudder v. Price, Lord Loughborough, who has shed more light upon this subject than any other judge, says that long before Slade's case the demand in an action of debt must have been for a thing certain in its nature; yet it was by no means necessary that the amount should be set out so precisely that less could not be recovered.

In short, if, before Slade's case, debt was the common action for goods sold and work done, it is more obvious that it was not thought necessary to state the amount due with such precision as that less could not be recovered; for in those cases, as the same judge observes, "the sum due was to be ascertained by a jury, and was given in the form of damages." But yet the demand was for a thing certain in its nature; that is, it was capable of being ascertained though not ascertained, or perhaps capable of being so when the action was brought. Whence the opinion arose that, in an action of debt on a simple contract, the whole sum must be proved, I cannot ascertain. It certainly was not and could not be the doctrine prior to Slade's case; and it is clear that it was not countenanced by that case. However, let the opinion have originated how it might, Lord Loughborough in the above case denominates it an erroneous opinion, and says that it has been some time since corrected.

In the case of M'Quillen v. Coxe, the sum demanded was five thousand pounds, which was fifty more than appeared to be due by the different sums. The objection was made on a special

demurrer that the declaration demanded more than appeared by the plaintiff's own showing to be due. The court did not notice the alleged variance between the writ and declaration or the misrecital of the writ, but overruled the demurrer because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ.

From this last expression it might be supposed that the court meant to distinguish between the sum demanded by the writ and that demanded by the declaration; but this could not have been the case, because the sum demanded by the writ and that demanded by the declaration was the same, viz., five thousand pounds. There was in fact no variance; for, though the declaration recites the writ, yet the sum demanded, and which the declaration declared to be the sum which the defendant owed and detained, was the same sum as that mentioned in the writ, and the objection stated in the special demurrer was made to the variance between the sum demanded by the declaration and the sum alleged to be due.

The distinction taken in the case of Ingledew v. Cripps, 2 Lord Ray. 815; Salk. 659, runs through all the above cases, and appears to be perfectly rational, viz., that where debt is brought on a covenant to pay a certain sum, any variance of the sum in the deed will vitiate. But, where the deed relates to matter of fact extrinsic, there, though the plaintiff demanded more than is due, he may enter a remittitur for the balance. This shows that debt may be brought for more than is due, and that the jury may give less; or, if they give more than is due, the error may be corrected by a remitter.

Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract where the sum demanded is uncertain, it would seem to follow that it would lie for a penalty given by the statute which is uncertain, and dependent upon the amount to be assessed by a jury. For, when they have assessed it, the sum so fixed becomes the amount of the penalty given. This, however, stands upon stronger ground than mere analogy.

The point is expressly decided in the case of Pemberton v. Shelton, Croke James, 498. That was an action of debt brought upon the first section of the statute (2 Ed. 6, ch. 13), which gives the treble value of the tithes due for not setting

them out. The declaration claimed thirty-three pounds as the treble value; and in setting forth the value of the tithes, the whole amount appeared to be more than one-third of the sum demanded, so that the plaintiff claimed less than the penalty given by the statute.

Upon nil debet pleaded, the jury found for the plaintiff twenty pounds, and a motion was made in arrest of judgment, for the reason above mentioned. The court overruled the motion upon the ground afterwards laid down in the case of Ingledew v. Cripps. They held that there was a difference when the action of debt is grounded on a specialty or contract, which is a sum uncertain, or upon a statute which gives a certain sum for the penalty, and where it is grounded on a demand when the sum is uncertain, being such as shall be given by the jury. In the former it was agreed that the plaintiff cannot demand less than the sum agreed to be paid or given by the statute; but in the latter it is said that if the declaration varies from the real sum it is not material, for he shall not recover according to his demand in the declaration, but according to the verdict and judgment which may be given for the plaintiff. It cannot be said that this doctrine was laid down in consequence of the court considering this as a statutory action, to which it was necessary to accommodate the recovery by changing general principles of law applicable to other cases; for it will appear, by a reference to the statute, that it prescribes no remedy for enforcing the penalty, and that debt was brought upon the common law principle that, where a statute gives a penalty, debt may be brought to recover it. In this case the statute gives the action of debt, and I cannot perceive in what other form than this one which has been adopted the declaration could have been drawn. Had it claimed the smallest sum, it might have been less than the jury might have thought the United States entitled to recover; and yet judgment could not have been given for more. I know of no precedent for a declaration in debt, claiming no precise sum to be due and detained, nor any principle of law, which would sanction such a form. On the other hand, I find abundant authority for saying that the demand of one sum does not prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances.

Rule discharged.

Trespass.

ABBOTT v. McCARTNEY.

1 Holmes 80 (U. S. Cir. Ct.). 1871.

Trespass de bonis asportatis for a wagon. On November 20, 1868, the plaintiffs attached the wagon on a writ in their favor against the New England Express Company. Under a Massachusetts statute which authorizes the sale of property attached on mesne process, the sheriff who made the attachment caused the wagon to be sold by auction on December 9, 1868, on the premises of one Johnson, where the wagon then was. The plaintiff bought it under an agreement between them and the sheriff that they need not pay for it until the suit between them and the express company should be decided. After the sale Johnson was instructed by the sheriff not to deliver any articles unless the purchaser should bring a receipt showing that they had been paid for. On January 6, 1869, they gave the sheriff a due bill for the wagon.

On November 13, 1868, the express company made their monthly return of receipts, showing a tax due the United States, and on December 19, 1868, the defendant, a United States collector of internal revenue, distrained the wagon for non-payment of the said tax, and notified the express company thereof; and on January 2, 1869, he sold the wagon at public auction. At the time of distraint the wagon was still on the premises of Johnson, and the plaintiffs knew nothing of the distraint, or of the sale thereunder, until after they had paid for the wagon.

SHEPLEY, J. It is contended on the part of the defendant that the plaintiff, upon the facts in this case, is not entitled to maintain an action of trespass de bonis asportatis. So far as the form of action is concerned, the principle of law contended for by the defendant is undoubtedly correct.

The general principle of law is that, in order to sustain an action of trover or trespass de bonis asportatis, the plaintiff must have had, at the time of the alleged taking or conversion, either possession or a right to the immediate possession of the goods; such a right as to be entitled to reduce the goods to possession when he pleased to do so. Bloxam v. Sanders, 4 B. & C. 941;

Smith v. Miller, 1 T. R. 475, 480; Ward v. Macauley, 4 T. R. 489; Putnam v. Wyley, 8 Johns. 432; Mugridge v. Eveleth, 9 Met. 233. Defendant contends that plaintiffs had not either property, possession or the right to immediate possession at the time of the alleged taking. He claims that the property of the express company had not been divested, and did not pass to the plaintiffs, for the reason that the sale to them was on credit, and that there was no actual delivery of the property. He contends, further, that the possession of Johnson was not the possession of the plaintiffs, and that the plaintiffs have not the right to possession until they paid the price; the officer having a special property in the goods until paid for.

The case of Prouty v. French, 2 Pick. 586, is relied upon to show that no property passed by a sale upon credit made by an officer. The case of Prouty v. French was the case of a conditional sale on credit on execution. There a speedy sale was indispensable, and the proceeds were needed for the immediate satisfaction of the execution on which the sale had been made.

The sale in this case was regulated by an entirely different statute, which provides for a sale on mesne process whenever the parties consent in writing, or whenever the property attached on mesne process may be liable to perish, waste or greatly depreciate in value by keeping, or cannot be kept without great and disproportionate expense. The object is to hold the goods or the proceeds, in some form or other, till judgment shall be rendered. In reference to such a sale, the supreme court of Massachusetts (Morton, J.) say, in Crocker v. Baker, 18 Pick. 407, 412: "We do not perceive that the credit given by the officer forms any objection to the validity of the sale. The goods would not sell for less on a credit than they would for cash. The officer might, and probably would, make himself responsible for the price. But neither debtors nor creditors would be liable to suffer. Nor does the statute, expressly or by implication, prohibit this mode of sale."

The proceedings of the officer being legal, the property vested in the purchasers. There was an agreement between the sheriff and the plaintiffs that they should have credit on their purchases until the suit was decided. Where goods are sold, and nothing is said as to the time of delivery or the time of payment, and everything the seller has to do with them is complete, the property

vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever demanded, upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Bloxam v. Sanders, 4 B. & C. 941. After the sale the purchaser on credit was immediately entitled to the possession, and his right was not divested by the general instructions given by the officer and the auctioneer to the stable-keeper after the sale, not to deliver the articles sold to the purchasers until they should bring a receipt from the auctioneer showing they had been paid for. Abbott, the purchaser, had, under his agreement for credit, a right of immediate possession against the officer, subject only to be divested by the insolvency of the purchaser and a stoppage in transitu by the vendor. Consequently he had the same right as against the stable-keeper, who was but a servant of the officer or auctioneer, as he was not a party to the instructions given to the stable-keeper. and does not appear to have assented to them.

After the sale the express company was neither the owner nor the possessor of the property sold. The ownership was in the purchaser, and the possession was in the stable-keeper, as the agent of the officer or the auctioneer or the plaintiffs, certainly not as the agent of the express company.

The notice, therefore, of the sale by the collector of internal revenue, not having been given as required by law to the owner or possessor of the property, was insufficient, and the collector, at the time of the sale having no paramount lien on the property sold, must be considered as a trespasser. After the sale on execution the sheriff became accountable for the proceeds of the sale. Any surplus of funds in his hands, beyond what might be required to satisfy the execution issued in the suit on which the property was attached and sold, would be liable to subsequent attachment; but the mere fact that there was no actual delivery to the purchaser would not let in another creditor to a priority of title. The case of Lanfear v. Summer, 17 Mass.

119, has no application to a case of this kind. Judgment for plaintiffs.

Trover.

SIMMONS v. SPENCER.

3 McCrary 48 (U. S. Cir. Ct.). 1881.

HALLETT, J. The first and second counts of the complaint set forth, in substance, a sale of certain property, which the plaintiff alleges belonged to him, and conveyances from the plaintiff to McCartney, and from McCartney to the defendant Spencer, which conveyances were deposited with the Merchants' and Mechanics' Bank of Leadville, to be delivered upon payment of a sum of money, amounting to $20,000, for the use of the plaintiff. By instructions given upon the leaving of the deeds with the bank, the money was to be deposited to the credit of the plaintiff in this suit. Plaintiff received $7,000 of this sum, and $13,000, which was afterwards paid by the purchaser, whoever he may be, was not by the bank placed to the credit of the plaintiff, but was, in fact, turned over to the defendant Spencer. And upon this state of facts it is claimed that a liability has arisen upon the part of all the defendants to pay the plaintiff this sum of $13,000. The structure of these two counts is for money due upon a contract; for money had and received by the defendants to the plaintiff's use. Nothing is said about any conversion of the money by the defendants to their own use, and there is nothing in the counts to indicate that they are based upon the theory that a tort was committed by the defendants in receiving this money and appropriating it in the way in which it is alleged they disposed of it.

In order to maintain an action as for money had and received it must appear that the money was jointly received by all the defendants, and upon that the law may imply a promise on the part of all to pay it to the rightful owner; and although, upon the facts stated here, there may be a liability in that form of action against Spencer alone, or against the parties constituting the Merchants' and Mechanics' Bank of Leadville alone, there cannot be a joint liability on the part of all these persons in that form of action, because they did not jointly receive this sum of money. The allegation is, in these counts, that the money was received by

the Merchants' and Mechanics' Bank of Leadville, and by it wrongfully and fraudulently turned over to the defendant Spencer. That may make a liability as for money had and received on the part of these parties, severally,—that is, upon the part of the persons constituting the bank and upon the part of Spencer, severally; but it cannot be a liability arising by contract on the part of all of them, because they did not jointly and collectively receive this money.

As to whether the action may be maintained against them jointly as for a tort,—in substance, as an action of trover,—there is some doubt. It is laid down in the case of Orton v. Butler, 5 B. & A. 652, that on a money demand merely to allege that the defendant received money and afterwards converted it to his own use, which is the form of the declaration in an action of trover, the action cannot be maintained, because, they say, to allow that would be to defeat the defendant's right to set-off; and that the action of trover can only be maintained where the specific thing for which suit is brought can be identified; and that it must be possible in such case, where an action of trover is brought, for the defendant to relieve himself from all liability of tendering the property for which the action is brought to the plaintiff; as, for instance, when it is brought for a horse, he may surrender the horse and relieve himself from liability.

The same view is taken in several cases in Croke's Elizabeth; and there are cases—one in 4 E. D. Smith (N. Y.), Donahue v. Henry, 162—which declare that when a sum of money has been received which belongs to the plaintiff in the suit, and concerning which it is the duty of the defendant to turn over the very sum which he received to the plaintiff, the very money, the same dollars and the same bills, if he received it in that form, that then, if he makes any other disposition of it, the action of trover may be maintained. Petit v. Bonju, 1 Mo. 64, is a case in which the plaintiff brought an action in that form, against parties who were conducting a lottery, claiming that he had become entitled to a sum of money as the holder of a ticket in the lottery, and that they had wrongfully refused to pay it over to him, and seeking in trover to recover the amount. The court say, in that instance, that if, in fact, any sum of money had been set apart to the plaintiff—$100, I think, was the amount—if it had been parceled off by itself, by the defendants, as his money, and afterwards

they had taken those dollars and converted them to their own use, he might bring an action of trover for the dollars so parceled off; but that he could not, upon the general charge that so much money was due to him and wrongfully detained by the defendants, maintain that action. His action must in that case be in the form of an action on contract, if he would recover at all.

That is the distinction that I think is recognized in all of the cases, and, applying it to the present case, it may be true that the defendants, the Bank of Leadville, as to the very bills, notes or coin, if it was such, which they received for this property, may be liable in an action of trover or an action founded in tort for the conversion of that money, if it be so alleged in the complaint. And if that money—the very same money—was paid over to Spencer, he also would be liable, and then in that case they both might be joined in one action as tort-feasors. To illustrate, I will read a paragraph from Bliss on Code Pleadings: "Under the code, an action for the recovery of personal property will lie against one who has wrongfully parted with the possession of property jointly with one in actual possession." Sec. 83.

And the same principle applies to trover: "Thus, one who has wrongfully pledged plate belonging to the plaintiff is liable to an action of detinue, jointly with the person to whom it had been pledged. So, where one has fraudulently obtained a credit upon a bill of goods and assigned them over for the benefit of his creditors, the vendor having the right to repudiate the sale and pursue the goods may make both the purchaser and his assignee parties to an action for their possession." Id.

For this the case of Nichols v. Michael, 23 N. Y. 264, is cited. The principle declared is that where a party has the right to a specific thing, and he can pursue that particular thing through several hands, he may charge all of these parties consecutively or all who held the property consecutively, in one action for its value. So that here, if it be true that the Smiths, or the persons who constitute the Merchants' and Mechanics' Bank, received this money and turned over the same money to Spencer, they may be jointly charged in proper phraseology as for converting that money, but not otherwise. And it must be the identical money.

These cases, and all the authorities that I have been able to find, go to the point that where an action is founded in tort and main-

tained upon that principle, it must be for the conversion of the specific thing, and it can only be maintained where the property itself can be traced to the hands of the party to be charged.

In that aspect, if the facts are truly stated in the first and second of these counts, no joint action can be maintained against these parties unless the pleader may be able to allege that the same money came to the defendants, the Merchants' and Mechanics' Bank of Leadville, and the defendant Spencer, successively. The plaintiff must allege that it was the same money, and that the defendants converted it to their own use, in order to make it an action for tort.

Upon the other theory there is no difficulty in maintaining an action against either of the defendants separately as for money had and received, and upon that principle, the third count, which states nothing as to the way in which the money came to the hands of the parties, but merely charges that the defendants are liable to the plaintiff for $13,000 received by them for the use of the plaintiff, is not open to any objection.

The ruling upon the demurrer, therefore, must be that it is sustained as to the first and second counts, because there the facts are stated which show that the defendants cannot be jointly liable, and overruled as to the third count, because nothing appears in that count to indicate that they may not be jointly liable.

If I have made myself understood, it will be apparent that the plaintiff must amend so as to make this substantially an action of trover for this sum of money against all these parties, or by dismissing his action against one or the other of the defendants. If the action were dismissed as to Spencer, or as to the defendants who constitute the Merchants' and Mechanics' Bank of Leadville, I would see no difficulty in maintaining it against the other.

Trespass on the Case.

EMIGH v. PITTSBURGH, FORT WAYNE AND CHICAGO RAILROAD COMPANY.

4 Biss. 114 (U. S. Cir. Ct.). 1867.

McDONALD, J. This is an action on the case for wrongfully putting the plaintiff off a train of the defendant's passenger cars. There are two counts in the declaration, and a demurrer to the

whole declaration is filed, for the cause that there is a misjoinder of counts. The first count is undoubtedly in case. But the defendant insists that the second count is in assumpsit and not in case. The charge in the second count is substantially as follows: That the defendant was a common carrier of persons from Pittsburgh through Indiana to Chicago; that for a valuable consideration paid to the defendant, the defendant agreed with the plaintiff to carry him over said road from 1866 to 1870, giving him annual passes so to be carried; that in March, 1867, the defendant received the plaintiff on the defendant's cars at Pittsburgh to be carried on said road to Fort Wayne, in pursuance of said agreement, and carried plaintiff to a point within five and one-half miles of Fort Wayne, when the defendant (having before refused the plaintiff said annual pass) by an agent of the defendant, and then the conductor on the train, refused to carry the plaintiff any further, unless he would pay fare for his passage; that the plaintiff insisting on his right under said agreement, the conductor stopped the train in the open country far from any depot, and there, by threats of violence, obliged the plaintiff to quit the train, and left him with his baggage where he had no means of conveyance to the place whither he was bound, at the dawn of day and exposed to the cold; and that by reason of the premises he suffered, etc., and was delayed in his business, etc., and sustained damages to the amount of $5,000. The defendant insists that this count is in assumpsit, because it is founded on a contract. It does, indeed, by way of inducement set out a contract. But, if that circumstance necessarily destroys its character as a count in case, then the first count is in the same predicament, for it also sets forth a contract, and a contract, too, very similar to the one in the second count.

As I understand it, the subjects proper for action on the case are of two distinct classes: First, where there is a tort committed without force, on the person, character or property of the plaintiff, entirely unconnected with any contract. Secondly, when there is a contract, either expressed or implied, from which a common law duty results, an action on the case lies for breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action. Thus, if a lawyer or a physician is engaged by special contract to render professional services, and if, in the

performance of such services, he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract. So this form of action lies against agents, wharfingers and common carriers, whether they be acting under a contract express or implied. Indeed, nothing is more common in the common law courts than the action on the case against common carriers of goods, though their engagements are always on contract, express or implied. If I hire a man to carry goods from Indianapolis to Cincinnati, and he wrongfully leaves them on the way at Lawrenceburgh, no lawyer will doubt that an action on the case will lie for this breach of duty.

The present case is that of a common carrier of persons; but can there be any difference on the point in question between the carrier of men and the carrier of merchandise? The authorities to this effect are numerous. I need only cite 1 Chitty's Pleadings, 132-4, and the cases there referred to in support of the doctrine. I entertain no doubt that both the counts in the declaration are properly counts in case.

The demurrer is therefore overruled.

Replevin.

RICKETTS v. DORREL.

55 Ind. 470. 1876.

From the Ohio County Circuit Court.

BIDDLE, J. Replevin commenced before a justice of the peace. The cause of action is stated as follows:

"William Dorrel, being duly sworn, says: that his personal property, consisting of seven hundred and thirty-eight rails of walnut and oak wood, of the value of fifteen dollars, and one hundred and sixty-four stakes of oak and walnut wood, of the value of five dollars, have been wrongfully taken and are unlawfully detained by James C. Ricketts; that said personal property has not been taken by virtue of any execution or other writ against him, and that he has sustained damages by said wrongful taking and unlawful detention, in the sum of twenty-five dollars," etc.

Before the justice of the peace the appellant moved the court to dismiss the action and quash the writ of replevin. His motion was overruled. Answer, general denial and two special para-

graphs. During the trial before the justice "It appeared to the court that the title to the land was under dispute," and he thereupon certified the case to the Ohio Circuit court. The parties in the Circuit court appeared to the action, and the appellant, without taking any exception to the mode in which the case had been certified up, moved to dismiss the action. His motion was overruled, and exceptions reserved. Trial by jury, general verdict for appellee, and for five dollars damages, with answers to special interrogatories as follows:

1. "Is William Dorrel the owner and entitled to the possession of the rails and stakes described in the complaint? Answer, Yes."

2. "Was Dorrel the owner of the east half of the line fence between him and Ricketts before the same was removed by Ricketts? Answer, Yes."

3. "Did the rails and the stakes in the complaint named, at the time when this suit was brought, and when seized by virtue of the writ of replevin herein, form a part of a partition fence dividing the lands of Dorrel and Ricketts? Answer, Yes."

4. "At the time this suit was brought, and when they were seized by virtue of the writ of replevin herein, did they form a part of and were they connected with, a standing fence? Answer, Yes."

The appellant moves "the court upon this written motion, now filed, for a judgment on the special findings of the jury herein."

These proceedings were had at the January term of court, 1875. At the March term of the court, 1875, the motion for judgment on the special findings was overruled, and exceptions reserved. No application or motion for a new trial upon written causes filed was made at the term the verdict was rendered.

No question, therefore, which arises under a motion for a new trial is presented in the record. Krutz v. Craig, 53 Ind. 561; Griesel v. Schmal, 55 Ind. 475; Sherlock v. The First National Bank, etc., 53 Ind. 73; Marshall v. Beeber, 53 Ind. 83.

In support of the motion for a judgment on the special findings, it is insisted that they show the rails and stakes replevied to have been, at the time, erected into a fence and remaining a part thereof; and that the fence being a part of the realty, and owned by the parties as tenants in common, can not be replevied as personal goods.

The special findings in this case plainly show that the rails and stakes replevied at the time the suit was commenced, and when they were taken by virtue of the writ, constituted a part of a standing fence, and were therefore a part of the realty. We are of the opinion that they were not "personal goods" in the true meaning of the statute authorizing replevin (2 R. S. 176, p. 623, sec. 71), and therefore not subject to be replevied, even admitting that they were wrongfully taken and wrongfully detained, and wrongfully put in the fence, by the appellant. If a person took and detained shingles, and nailed them up, on his roof, or wrongfully took and detained brick and laid them in a wall, it would be a mischievous and unsafe rule to allow the owner to replevy them, even though his rights were greatly outraged. There are other remedies to redress a wrong of this kind; and in laying down the present rule, as law, we deny the party no right, but simply refuse him a remedy by replevin. In the present case, if the appellee has suffered a wrong, we think he has mistaken his remedy to redress it.

The judgment is reversed, with costs. Cause remanded for further proceedings.

On Petition for a Rehearing.

BIDDLE, J. The earnestness of the petition for a rehearing in this case convinces us of the sincerity of the petitioner, but it seems to us that he has misconceived the scope of the opinion pronounced. He labors to convince us that when a tree is wrongfully converted into rails, they may be replevied; that when timber is wrongfully cut and converted into coal, the coal may be replevied; and he cites other similar cases. The opinion nowhere controverts these propositions. When an article is made personal property by being severed from the realty to which it first belonged, it may be replevied as long as its separate identity can be ascertained, whatever shape it may take; but when an article of personal property, though wrongfully taken, has become real estate, by being attached to the realty, it cannot be replevied, because it has lost its separate identity and its character as personal property. To apply these principles to the present case: If rails are wrongfully taken from a fence, they become personal property and may be replevied by the owner; but if rails are

wrongfully taken and put into a fence, and thus made a part of the realty, they cannot be replevied, because they have lost their separate identity, and cannot be delivered without detaching them from the realty, of which they have become a part. And this is precisely the case we are considering. We have examined the authorities cited by the petitioner, and as we read them all the cases in replevin are against the petitioner. In Davis v. Easley, 13 Ill. 192, it is held that a party may maintain replevin for boards made from trees wrongfully cut on his land; and also held that the owner of personal property, wrongfully taken, may replevy it so long as it can be identified, unless it is annexed to or made a part of some other thing which is the principal, as timber converted into a house, grain converted into malt, or coin converted into a cup.

The appellee labors hard, and cites many authorities to show us that a wrongdoer can not obtain any title in the property he wrongfully takes, as against the owner, * * * a proposition nowhere disputed; but it does not follow that the action of replevin will lie in all cases merely because the owner has not lost the title to his property. Nor will our statements abolishing the distinction between forms of actions aid the appellee. The legislature cannot abolish the distinction between the personal and real actions, nor between actions to enforce a specific performance of a contract or recover a specific article, and those which seek merely a money judgment; nor between actions arising out of tort, and those founded upon contract; because the distinction exists in fact, and not mere form. The distinction between the action of debt, covenant, assumpsit, trover, trespass, trespass on the case, and suits in equity and to recover money directly may be and is abolished by the code, because the remedy sought in all these cases is the same—namely, a money judgment. The appellee, therefore, cannot bring his action in replevin to recover his specific rails, and failing in that, maintain his case to recover a money judgment for their value, merely because he has not lost his property in the rails. The law affords his ample remedy if he rightly chooses it; but it is no part of the duty of this court to instruct him as to what that remedy is.

The petition is overruled.

CHAPTER V.

PROCEEDINGS IN OTHER COURTS AND EFFECT OF THE CODE ON FORMS OF ACTIONS.

Single Form of Action at Law and in Equity.

GETTY v. HUDSON RIVER RAILROAD COMPANY.

6 How. Pr. 269 (N. Y.). 1851.

This was a motion to set aside an amended complaint. The facts sufficiently appear in the opinion of the court.

PARKER, J. The defendant seeks to set aside the amended complaint on the ground that it is for a cause of action different from that set forth in the original complaint, and therefore irregular.

The original complaint alleged the construction of a railroad across a bay between plaintiff's farm and the Hudson River, and claimed damages for thus obstructing the navigation between the farm and the river. The amended complaint not only claims damages for the injury already suffered by such obstruction, but also seeks indemnity for the future, by praying that the defendants be adjudged and enjoined to construct such a bridge as is required by the fifteenth section of their charter, so as to admit of the passage of plaintiff's boats and vessels between the farm and the river.

The original complaint claimed only legal relief. The amended complaint claims relief, both legal and equitable, and it is here contended by the defendant's counsel that they cannot both be united in the same action.

The facts set forth in both the complaint and the amended complaint are substantially the same. It is only in the relief prayed that they differ.

We have certainly made but little progress in the reform that has been attempted, if law and equity can now only be administered in separate actions. If such is held to be the present rule of practice, the very object of having law and equity administered

in the same tribunal and in the same forms of proceeding will be defeated. It was formerly considered a great evil that in a suit at law the plaintiff could be turned out of court, on the ground that his relief was in chancery; and that where a bill was filed in the Court of Chancery, it might be dismissed on the ground that the complainant had an ample remedy at law. The evil is still just as great as it was formerly, if a party can have only legal or equitable relief in the same action, in such case, if he commences his action asking for equitable relief, as for instance a specific performance, and it turns that he is not entitled to it, but only to legal relief by way of damages, he might perhaps, if such strictness is to govern, be put to a new action to obtain redress. This certainly ought not to be, and such a strictness is hostile to the whole spirit of the change that has been made. In trying such a case at the circuit, I should most certainly allow whatever amendment in the pleadings was necessary to give the party redress. If the plaintiff had asked for equitable relief, and it turned out that he was entitled to legal relief only, I should permit him to take it in that form. And if he asked for legal relief only, when he was entitled to legal and equitable relief, I should allow the proper amendment to administer to complete judgment in the case. The power to amend authorized by the Code is ample for such purpose. Now, the last case of amendment I have mentioned as permissible at the circuit is precisely what is claimed in this case, with this difference only, that it is claimed to be made here, before issue joined, and when, of course, the defendant has abundant time and opportunity to prepare to meet the claim at the circuit.

I see no objection in this case to uniting claims for both legal and equitable relief in the same action. Both depend on the same transaction and both are necessary to indemnify the plaintiff for past, and to protect him against future, injury.

I think the proper course, under our present system of practice, is to give the party whatever relief is applicable to the facts put in issue by the pleadings and established on the trial whether such relief be legal or equitable, or both. And I see no reason against uniting in one action claims for both legal and equitable relief when they are not inconsistent with each other. (Linden v. Hepburn, How. Pr. 188.) Substantial justice must no longer be sacrificed to mere form and technicality.

It is said that different modes of trials are prescribed for legal and equitable issues. But they are not necessarily to be tried differently, for section 254 of the Code gives ample power to the court to direct that the latter class be tried before the same tribunal which is prescribed by sections 252 and 253 for the former class. Nor is the distinction at all material; and inasmuch as the court adjudges the relief in all cases, both legal and equitable, on the facts established, whether they were found by the court itself or by a jury.

I think the amended complaint is regular, and the motion must therefore be denied, with $10 costs.

Kind of Action Brought Determines Right of Recovery.

SUPERVISORS OF KEWAUNEE COUNTY v. DECKER.

34 Wis. 378. 1874.

Appeal from the Circuit court for Kewaunee county.

This case has been twice before this court on appeal, and is reported in 28 Wis., p. 669, and 30 Wis., p. 624; and a statement of the action as originally brought appears in the volume first named.

Pursuant to the order made in this court on the last appeal (see 30 Wis. 624), the Circuit court of Kewaunee county made an order sustaining the demurrer to the complaint, and granted leave to the plaintiff to amend his complaint. Plaintiff then served an amended complaint, substantially the same as the original, except that the words "and converted the same to his own use" are omitted. The defendant's attorneys at once returned the amended complaint, on the ground that the summons was one for relief; that the complaint theretofore served was in conformity with such summons, for an action in tort; and that the amended complaint proposed to change the causes of action ex delicto into several causes of action ex contractu. Afterwards the defendant moved to strike from the files of the court the amended complaint, on the same grounds; and appealed from an order denying the motion.

COLE, J. The original complaint, according to the decision of this court, stated a cause of action for the wrongful conversion

of money, although it was held that the pleading was defective for not setting out the facts showing in what the fraud or wrong of the defendant consisted (30 Wis. 624). The amended complaint, it is conceded, states a cause of action on contract for money had and received. And the sole question presented is, whether a party, under the form of an amendment, can change the very gist and nature of the action from one ex delicto to one ex contractu? The counsel for the plaintiff insists that the true rule of law is, that there is no restriction upon the power of the court to allow amendments before trial, even though the effect of the amendment be to change the whole cause of action or grounds of defense. And he refers to a number of decisions in the state of New York, which he claims sustain this position. * * * We shall not go into any examination of those cases to determine whether they sustain to the full extent the position to which they are cited, or not. It is sufficient to say that the rule has been practically settled the other way in this state in a great number of cases, and we have no disposition to throw any doubt upon the correctness of those decisions by treating the question as an open one. The cases in this court will be found in the note of the chief justice to Brayton v. Jones, 5 Wis. 117, Appendix 627, where they are fully commented on and explained. It is shown that an amendment before trial which attempts to change the nature of the action from one in tort to one in contract, is properly not an amendment, but a substitution of a cause of action different in nature and substance from that originally stated. The power of amendment does not go to that extent, and therefore the amended complaint in the present case was unauthorized.

When evidence is admitted on the trial without objection, great liberality of amendment is exercised by the court in order to conform the pleadings to the facts proven, and give the plaintiff the relief he may seem entitled to. 22 Wis. 347; 26 Wis. 540. But this stands upon different grounds, as will be seen in those cases. It is true the amendment was merely striking out only a few words of the original complaint; but it so happens that these words give character to the action, and show it to be one in tort. And we are fully of the opinion—to use an illustration put by the counsel for the defendant—that the Code never intended to allow a party to file a complaint for the conversion of a promis-

sory note; then by amendment change the complaint into one for the recovery of real estate; and that again into a bill in equity to enforce the specific performance of a contract, or one to redeem a mortgage, and so on. This is very like a reductio ad absurdum; but to that length the position of the plaintiff's counsel logically leads. But this question is so thoroughly treated in the note above alluded to, that any further discussion of it seems quite unnecessary.

That the order refusing to strike the amended complaint from the files is appealable, was not seriously questioned on the argument.

By the Court: The order appealed from is reversed and the cause is remanded for further proceedings according to law.

Special Proceedings Distinguished as to Procedure.

ANDERSON v. CALDWELL.

91 Ind. 451. 1883.

HAMMOND, J. This was a proceeding on the petition of the appellee, for the construction of a ditch, under "An act concerning drainage," approved April 8th, 1881, section 4273, R. S. 1881, et seq. The commissioners of drainage reported in favor of the work, and also reported their assessments of benefits and damages to lands affected by it. As to the land of the appellant, they reported that it was neither benefited nor damaged. To this he filed his remonstrance, raising issues of facts, and demanded that such issues should be tried by a jury. His demand was refused, and the case was tried by the court, resulting in a finding and judgment of approval and confirmation of the report of the commissioners. The appellant, by his exception, motion for a new trial, and assignment of error, has properly presented in this court the question whether he was entitled to a jury trial. Section 4 (4276 R. S. 1881) of the drainage act under consideration provides that "questions of fact shall be tried by the court, without a jury." This, it is claimed by the appellant, is in conflict with section 20, article 1, of the state constitution, which provides that "In all civil cases, the right of trial by jury shall remain inviolate."

The rule of construction is well settled that an enactment of

the legislature is not to be struck down by the courts for unconstitutionality, unless it is clearly in conflict with the fundamental law. Brown v. Buzan, 24 Ind. 194; Lafayette, etc., R. R. Co., v. Geiger, 34 Ind. 185; Groesch v. State, 42 Ind. 547; Buskirk Prac. 252.

By section 1 of the Code 1852, and section 249 of R. S. 1881, every action "for the enforcement or protection of private rights and redress of private wrongs" is "denominated a civil action." The words civil actions prior to the adoption of our present constitution were not so comprehensive in their meaning. They included only what were known as common law actions. Section 20 of article 1 of the constitution was adopted with reference to actions that by common law were triable by jury. As to such actions the right of trial by jury was to remain inviolate. It was competent for the legislature, as it did by the Code of 1852, to extend the right of trial by jury to cases that previously had not been recognized as civil actions, but it could not, without infringing on the constitution, abridge such right as to cases triable by jury at common law. The constitution simply guarantees the continuance of the common law right of trial by jury. In other cases the legislature may extend or limit this right without violating the constitution.

In Lake Erie, etc., R. R. Co., v. Heath, 9 Ind. 558, in speaking of the constitutional provision respecting jury trials in civil cases, this court says: "The above provision in our constitution applies in terms but to civil cases. What, then, within its meaning, is a civil case? Not every case which is not a criminal is a civil one. 'Civil case' had a definition, a meaning, at common law, when the early constitutions of this country were formed, and it has been held that the term was used in those constitutions in the common law sense."

Again, in Allen v. Anderson, 57 Ind. 388, it is said: "This provision" (section 20, article 1) "of the constitution was adopted in reference to the common law right of trial by jury, as the language plainly imports, namely that the right shall remain inviolate," that is, continue as it was. The words "in all civil actions" mean, in all civil actions at the common law, as debt, covenant, assumpsit, trover, replevin, trespass, action on the case, etc.

Section 16 of the act of 1859, relating to supervisors, I. R. S. 1876, p. 858, authorized the supervisor to enter upon any land

adjoining or near any highway and thereupon to construct ditches, etc., or to cut down and remove any wood or trees necessary for the construction or repair of a highway. The person aggrieved could petition the township trustee for an assessment of damages; the trustee thereupon appointed three disinterested persons to make the assessment of damages, which were paid out of the township fund. No appeal provided for, nor any method of trial by jury; and yet the party injured had no remedy but that provided in the statute; he could not bring suit against the supervisor. It was held that this statute did not conflict with the constitution. Dronberger v. Reed, 11 Ind. 420.

In the case of Evansville, etc., R. R. Co. v. Miller, 30 Ind. 209, which was an appeal to the Circuit court from an assessment for damages sustained by the owner of land taken for the railroad, it was held that a jury trial was not allowable as a matter of right.

The question in the present case is whether the proceeding under the Drainage Act of 1881, for assessing benefits and damages to land affected by the ditch, is a civil action, as that term was understood in this state prior to the adoption of our present constitution. We are inclined to the opinion that this proceeding is not a "civil action" within the meaning of the constitution. We think it is a special statutory proceeding in which it is competent for the legislature to dispense with a jury. Hays v. Tippy, 91 Ind. 102. At all events, we cannot say with certainty that the statute under consideration, requiring the trial to be by the court without a jury, is clearly in conflict with the constitution. In such case, it is our duty to declare in favor of the constitutionality of the law, leaving the hardship, if any, to be corrected by the legislature.

We find no error in record.

The judgment of the court below is affirmed, at the costs of the appellant. (Concurring opinion by ELLIOTT, J.)

CHAPTER VI.

PARTIES TO ACTIONS AND JOINDER OF ACTIONS.

GARLAND v. DAVIS.

4 How. 131 (U. S.). 1845.

Error to the Circuit Court for the District of Columbia.

WOODBURY, J. In the examination of this case a defect has been discovered in the pleadings and verdict which was not noticed in the court below nor suggested by the counsel here; and the first question is whether, under these circumstances, it can be considered by us; and if it can be, and is a material defect, not cured or otherwise capable of being overcome, whether it ought to be made a ground for reversing the judgment and sending the case back for amendment and further proceedings.

There can be no doubt that exceptions to the opinion given by courts below must all be taken at the time the opinions are pronounced. But it is equally clear that when the whole record is before the court above, as in this case, any exception appearing on it can be taken by counsel which could have been taken below. Roach v. Hulings, 16 Pet. 319. So it is the duty of the court to give judgment on the whole record and not merely on the points stated by counsel. Slacum v. Pomeroy, 6 Cranch 221; Baird & Co. v. Maddox, 1 Call 257; 16 Pet. 319.

In United States v. Burnham, 1 Mason 62, the court alone took notice of the defect which was the sole ground of its opinion. In Patteson v. United States, 2 Wheat. 222, it is stated that "the points made were not considered by the court, and judgment was pronounced on other ground;" and Justice Washington says (p. 24): "The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it;" and on that account the proceedings below were reversed. See, also, Harrison v Nixon, 9 Pet. 483, 535.

Statement of Facts: I proceed, then, to consider the nature

and character of the difficulty in this case appearing on the record. Since discovering it, an opportunity has been given to the counsel for the original plaintiff, which has been improved, to attempt to remove it by argument and authorities. But it still remains and consists in this.

The declaration is an action on the case, sounding in tort. It sets out no contract except one by way of inducement, made by Mr. Franklin, the predecessor in office of the defendant, and it then proceeds to make the gist of its complaint a wrongful and injurious neglect and refusal by the defendant to furnish a copy of certain laws to the plaintiff, as had been agreed by Franklin. We are required to take this view of the declaration, not only by the averments in it, but by both the present and past positions of the counsel for the plaintiff, that it was intended to be founded on a misfeasance. The plea, however, instead of being "not guilty," as was proper in such case (Com. Dig., Pleader), is non assumpsit, and the plaintiff below, not demurring thereto, nor moving for judgment notwithstanding such a plea, joined issue upon it, and the verdict of the jury conforms to the plea and issue, and merely finds "that the defendant did assume upon himself in manner and form," etc., and assesses damages "sustained by reason of the non-performance of the promise and assumption aforesaid."

Beside the general reasoning in the books, that pleas amounting to the general issue should traverse the material averments in the declaration, and, where the action is one on the case for a tort, should deny the tort by pleading "not guilty," it is laid down in most elementary treatises that "not guilty" is the proper general issue in such cases. See Com. Dig., Pleader. Beyond this, it has been actually adjudged in an action on the case, after full hearing, that non assumpsit was a bad plea. Noble v. Lancaster, Barnes' Notes 125. That action was trover, but being still an action on the case, the same principle applied. Nor is the difference merely formal or technical between actions founded in tort and in contract. 1 Chit. Plead. 229, 418. Because, when in tort or ex delicto a set-off is not admissible nor can infancy be pleaded as to one ex contractu, nor can a plea in abatement be sustained, that all concerned in the wrong are not joined, as it may be in counts on contracts, and a writ of inquiry must issue to ascertain the damages, which is often unnecessary

in suits on contract. A declaration is bad which unites a count in tort with one in contract. 2 Chit. 229, 230; 1 Chitty 625, note; 4 D. & E. 794; 8 D. & E. 33.

Various other cases analogous to this might be cited, which tend to show that the present plea is improper, but it is not deemed necessary, in this stage of the inquiry, to enlarge on that point; and I proceed to the next and more difficult question, whether such a plea, though bad on demurrer, should not be considered as good after verdict, and cured by the statute of jeofails.

As a general rule, all informality in a good plea is held to be cured by a verdict, and ought to be, in order not to delay, through a defect of mere form, what may seem to be just. 1 Levinz 32; 6 Mod. 1; Com. Dig., Pleader, 18; 6 Johns. 1.

Here, however, there appears to be no informality in a good plea. On the contrary it looks more like formality in a bad one. And if it be asked whether there are no cases or bad pleas which are cured by a verdict, we answer that several exist, but that they are cases where the pleas, though bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue the material parts of the declaration. That is the test.

In the opinion of the majority of the court the plea under consideration does not contain enough for that purpose; and my apology for examining this point somewhat more in detail must be found in the circumstance that the court are divided upon it.

The provision by congress in relation to amendments is to be found in the thirty-second section of the judiciary act of September 24, 1789 (1 Stats. at Large 91), and is similar to that in the 32 Henry VIII., but certainly not broader. See the former, in 1 Little & Brown's ed. 91, and the latter in 1 Bac. Abr., Amendment and Jeofail, B.

Under both of these statutes it has frequently been adjudged that defects in substance are not cured by a verdict; "for this," says Bacon (Abr., before quoted, E.), "would have ruined all proceedings in the courts of justice; and a defect in substance, in a plea or verdict, is conceded, in all the books, to exist when they do not cover "whatever is essential to the gist of the action."

The present plea, if tried by this test, seems not to be remedied by the verdict; because, so far from traversing all that is essential, nothing is denied, unless it be the inducement. Thus it traverses

a promise simply; but the only promise set out in the declaration is one introductory to those material averments, which, as before stated, are the wrongful and injurious acts of the defendant. So far from denying those acts, the plea entirely passes them by, and they are neither put in issue, nor a verdict returned upon them one way or the other. It is true that, in some actions for a tort, a promise may be referred to in the declaration, which sometimes will constitute one material fact among several others. But it is only one, and not the whole, nor is it the most material fact; that being, in such cases, the misfeasance of the defandant. Nor does the verdict here find this one fact or promise such as averred in the inducement. There it is stated to be made by Mr. Franklin; but, on the contrary, the verdict finds a promise made by the defendant.

On recurring to precedents several are found which confirm these conclusions. In respect to pleas they show that, when so imperfect and immaterial as this, they are not cured by verdict. And the reason generally assigned, and which pervades the whole, is that before mentioned, namely, that they do not cover or traverse all the gravamen of the declaration. Staple v. Heydon 6 Mod. 10; Willes 532; Tidd's Pr. 827; Gilb. C. P. 146.

Hence it has been decided that a plea of non assumpsit to an action of debt is not thus cured (Brennand v. Egan, 4 Taunt. 164; Penfold v. Hawkins, 2 Maule & Selw. 606), because it covers too little or is irrelevant. While in pursuance of the same rule it has been held that nil debet to assumpsit (1 Hen. Bl. 664), and "not guilty" either to assumpsit (Cro. El. 470, and 8 Serg. & R. 441), or to covenant (1 Hen. & Munf. 153), or to debt for a penalty (Coppin v. Carter, 1 B. & E. 462, note), are cured by a verdict because they contain enough to put in issue all which is important in the declaration.

In the present case the issue manifestly reaches only a part of the case and is therefore incurable (Hardress, 331); and it comes expressly within the definition of an immaterial issue, which is also incurable. Carth. 371; Bac., Abr., Verdict, K., 2 Levinz 12; 2 Saund. 319; 2 Mod. 137; Gould's Pl. 506, 509. This is undoubted from Williams' definition in Bennet v. Holveck, 2 Saund. 319, a. He says: "An immaterial issue is where a material allegation in the pleadings is not answered, but an issue is taken on some point which will not determine the merits of the case, and

the court is often at a loss for which of the parties to give judgment."

So in Benden v. Manning, 2 N. H. 291, it is laid down on circumstances like the present, that "if, instead of assumpsit, a special action on the case had been brought for misfeasance, it is very clear that no consideration need have been alleged or proved. The gist of such an action would have been the misfeasance, and it would have been wholly immaterial whether the contract was a valid one or not." 5 D. & E. 143; 2 Wils. 359; 1 Saund. 312, note 2.

If we should next compare this plea and issue in their substance with a few others less general that have been solemnly adjudged to be bad, and not cured by verdict, though found for the plaintiff, the result will be the same.

It may be seen in Tryon v. Carter, 2 Str. 994, that, in debt on bond payable on or before the 5th of December, the defendant pleaded payment on the 5th of December, an issue being joined and found against him, the court still awarded a repleader, as it could not be inferred from these pleadings that payment may not have been made before the 5th.

See another in Enys v. Mohun, 2 Str. 847, where, to covenant on a lease to C., averred to come by assignment to the defendant, the plea was that C. did not assign to him, and the verdict was for plaintiff. But the court awarded a repleader, as the issue found does not cover all the important points of the declaration, namely, that the lease may have come to the defendant, not from C. direct, but by mesne assignments. Same case in 1 Barnardiston 182, 220. See also other cases. Yelv. 154; Beck v. Hill, 2 Mod. 137; Read v. Dawson, id. 139; Stafford v. Mayor of Albany, 6 Johns. 1; Com. Dig., Pleader, 1 and 2, V., 5; Chit. Pl. 625, 695; 6 D. & E. 462; 1 Saund. 319, n.

In Patterson v. United States, 2 Wheat. 225, Judge Washington lays down the whole law precisely as we view it in respect to a verdict varying materially from the issue, and which principle applies equally well to a plea varying from the substance of the declaration. He says: "Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding so as to make it harmonize with the issue, yet if it appear to that court or to the appellate court that the finding

is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict." And on error the proceedings below were reversed.

After all this, it is hardly necessary to state further, by way of precedent, that in Noble v. Lancaster, Barnes' Notes, 125, before cited, this very point was decided. Non assumpsit was pleaded to an action on the case (e. g., trover), and was held not to be cured by a verdict, but was bad in arrest of judgment.

Looking, then, to many precedents as well as correct principles in pleading, the issue presented and tried here is not only an improper one for the case, but not containing enough to cover all that is material in the declaration, and being thus imperfect in substance, it "does not determine the right between the parties," and is not cured by the verdict or the statute of jeofails.

A moment as to the defects in the verdict. It is difficult to see how an immaterial and bad plea can be cured by a verdict which, as in this case, is quite as immaterial as the plea. Indeed, in some respects the verdict here compared with the declaration is more defective and irremediable than the plea. It is laid down in Comyn's Dig., Pleader, S., 24, that a verdict is even void if it be "variant from the declaration;" and he gives as one illustration from 2 Roll. 703, 1, 35, "in assumpsit, if he finds a different promise."

In the present case the promise is found not only different from that laid in the declaration as inducement, but the verdict varies in other essential respects from the declaration, finding nothing of any of the misfeasance charged in it on the defendant. The defect here, then, is in the verdict as well as plea, and though a mere informality in the former is cured by the act of congress as to amendments (16 Pet. 319), yet the defect here is similar in both, and, as just shown, being on principle in both, a defect in substance no less than form is uncured. Stearns v. Barrett, 1 Mason, 170, and 2 Mason, 31. * * *

CHAPTER VIII.

THE DEFENSES TO AN ACTION AND THE DEFENDANT'S PLEADINGS AND RULES GOVERNING THEM.

BROWN v. DUCHESNE.

2 Curtis 97 (U. S. Cir. Ct.). 1854.

CURTIS, J. This is an action on the case for the violation of a patent-right. The defendant pleaded the general issue and two special pleas. The plaintiff demurred as follows: "And the said plaintiff says that the several pleas by the said Duchesne, in manner and form aforesaid pleaded, and the matters therein contained, are insufficient to bar the plaintiff," etc., in the usual form of a demurrer. And he assigns several cases of demurrer especially. Without regard to the defects of form specially pointed out, if this demurrer is taken to all the pleas, and any one is found good, the demurrer is overruled. There is certainly one good plea, for the general issue, in the usual form, is upon the record. And it is clear the demurrer covers all the pleas. It applies in terms to the several pleas, which means all the several pleas.

There is a settled form of replying to one or more pleas to the exclusion of others, which is "as to the said pleas by the said defendant secondly, or secondly and thirdly, above pleaded," etc. When not thus restricted, the legal intendment is that all are included in the answer made to them.

The demurrer must be overruled.

STATE EX REL. BARRELL ET AL. v. CHRISTMAN ET AL.

2 Ind. 126. 1850.

Appeal from the Boone Circuit Court.

PERKINS, J. Debt upon an administrator's bond against him and his sureties. The plaintiff is The State upon the relation of Barrell and Hannah. The defendants are John Christman,

John N. Nelson, Simon Emmert, Samuel Miller, David Bush, William D. Porter, Caleb Osborn, and John Porter. The date of the bond is alleged to be the 29th September, 1838. John Christman is the administrator, and upon the estate of John Galvin, deceased. The condition of the bond is stated in the declaration; and, according to that statement, is in the usual form of an administrator's bond. The declaration alleges that, in April, 1840, Barrell and Hannah obtained a judgment against Christman as administrator upon a debt due from Galvin; and that an execution upon it was returned, no goods, etc., of the deceased Galvin's estate. It then assigns four breaches of the condition of the bond by Christman. The first is that he had received large amounts of the effects of Galvin with which he should have paid such judgment, but that he had wasted them, etc. The other breaches need not be stated. The defendants pleaded separately, and filed in the aggregate fifty-one pleas. The case went off upon demurrer in favor of the defendants; and we shall find it necessary to state but one of the pleas in determining upon the correctness of the decision below.

The eighth plea of William D. Porter was as follows: "The said defendant says actio non, because he says that the said John Christman, on the 29th September, 1838, in the vacation of the Boone probate court, took out special letters of administration on the estate of one John Galvin, deceased; and the said supposed writing obligatory in the plaintiff's declaration set forth, was the supposed bond of the said John Christman, and the other defendants herein, for the faithful discharge of such duties as such administrator; and the said Boone probate court, at its session next ensuing the date of said bond, did not confirm the said special letters of administration, nor continue said bond. And the said defendant avers that, from the 29th September, 1838, until the end of the next session of the said probate court thereafter ensuing, the said John Christman was not guilty of any of the said supposed breaches of the conditions of said bond. Without this, —that the said John Christman was the administrator of the goods, chattels, rights, etc., of the estate of the said John Galvin, deceased, at any time after the end of the session of the Boone probate court next succeeding the said 29th September, 1838; and this," etc.

To this plea the plaintiff replied, giving a minute history of

Christman's vacation-appointment, and averred, "that the said John Christman, under and by virtue of said appointment, took upon himself the burden of said administration, and possessed himself of the goods, etc., of said estate, and proceeded to make an inventory, etc., thereof (the said John Porter assisting, etc.); and afterwards, and before the term of said probate court next ensuing his said appointment, said Christman caused said inventory, etc., to be filed in the office of said clerk of said probate court; and at the term of said court next ensuing said appointment of Christman, to wit, at the November term, 1838, said court (whereof Samuel McLean continued to be judge, and who, as such in vacation, approved said Christman's bond) made no order of record in relation to said appointment and said bond; nor did the said court, at said November term, 1838, or at any other term ever recall or set aside the appointment of said Christman or disapprove of said bond, or appoint any other administrator of said estate, or make any other appointment of said Christman, as such administrator; nor was any other or different administrator of said estate ever granted, than said appointment of said Christman as aforesaid made; nor was any other security ever given by or on behalf of said Christman in the premises, than the bond aforesaid, and said plaintiff further avers that, by virtue of said vacation-appointment, Christman continued to act as administrator for many years after said November term, 1838, and made reports of his doings as such to said probate court, which said court received and acted upon, and further dealt with and treated said Christman as administrator as aforesaid, under and by virtue of said vacation-appointment, and after the said November term, 1838; and while said Christman so continued to act as such administrator, under his said appointment, he, the said Christman, committed the grievances, etc., complained of, etc., which the plaintiff is ready," etc.

To this replication a demurrer was sustained, and final judgments given for the defendants.

The replication was to several pleas, all similar to the one we have set out, and what we shall say will apply to all of said pleas.

The plea in question was drawn with an eye to the following provisions of the Revised Statutes of 1838, p. 178, s. 18: "When any person shall die intestate in the vacation of said court

(probate court), and his or her estate is in such condition as to require the immediate care of some person of competent integrity and ability, it shall be lawful for the clerk of such court, in the county in which, by the conditions of this act, administration shall be granted, to grant some such person special letters of administration on the estate of the said deceased until the next ensuing session of said court." "Provided, that such court, at its next ensuing session after the granting of such special letters of administration, at its discretion, may confirm or revoke the same; and if such court shall confirm the granting of said letters, it may, at its discretion, either continue the bond taken as aforesaid by said clerk, or require such administrator to renew said bond, conditioned as aforesaid; and if such court shall revoke such letters, it shall proceed to grant general letters of administration to such person or persons as are or may be legally entitled to the same."

The plea is what is called a special traverse, and its inducement must be, in substance, a sufficient answer to the declaration, though not a direct denial, nor yet a confession and avoidance of it, and the traverse with which it concludes must go to a material point which will try the merits of the case. We think this substantially such a plea. The declaration goes upon a general appointment as administrator, and alleges breaches occurring nearly two years subsequent to the appointment. The plea, in its inducement, states the appointment to be a special one, made by the clerk in vacation, to continue till the next term of the court; that the appointment was not confirmed at that time and that no breach occurred prior thereto. Now, as the clerk had only power to make an appointment that should continue till the next term of court, and as that made was not, according to the plea, confirmed at that term, it would seem that Christman could not have been administrator of said estate at the time the alleged maladministration took place; and if not, his sureties could not be liable for it. As to the traverse, it denies directly that Christman was administrator at the time of the commission of the alleged breaches. The decision of that question would certainly determine the merits of the case. It has been objected that the special traverse was not the proper plea to have been adopted on this occasion; that it should have been a simple traverse of the fact that Christman was administrator at the time of the alleged

breaches. Suppose this to be true, as to which we give no opinion. Still, as the plea adopted that very traverse, the inducement can be regarded as nothing worse than surplusage, which does not vitiate on general demurrer, as upon which we must decide upon this plea.

The plaintiff, then, not seeing fit to demur to the plea, specially, and it being good, as we have seen, upon general demurrer, what course was left him to pursue in regard to it? Stephen, in his work on Pleading, p. 189, says: "As the inducement of a special traverse, when the denial under the absque hoc is sufficient, can neither be traversed nor confessed and avoided, it follows that there is, in that case, no manner of pleading to the inducement. The only way, therefore, of answering a good special traverse is to join issue upon it." See also The Mayor of Oxford v. Richardson et al., 4 T. R. 437, and Benner v. Elliot, 5 Blackf. 451. And this is but the general rule as to all good traverses. There cannot be a traverse upon a good traverse, and there cannot be a confession and avoidance of a good traverse. Issue must be taken on it. In this case suppose the defendant had simply traversed the fact that Christman was administrator, could it have been possible for the plaintiff to have confessed the fact that he was not administrator, and still avoid it so as to hold him liable as being administrator?

It remains but to determine whether the replication in this case does take issue on the plea. The plea is that Christman was not administrator at the time of the alleged breaches. The replication should have simply and directly joined issue upon it. It does not do this, but recites facts and circumstances going to show that Christman was administrator, but not such, we think, as, if true, would establish the fact. The probate court is a court of record. A record of its proceedings is required by law to be kept. Its acts are evidenced by its records. It is admitted in the replication in this case that the court made no entry of record continuing Christman in office, or continuing his bond in force. It is not alleged that any such order was announced by the court, and omitted by the clerk to be recorded. The appointment must have been continued by the court at the term next after it was made, or it then expired, and no subsequent attempt to continue it could avail. The only fact relied on to evidence such continuance is that at said next term Christman made re-

port of his doings to that time. This he was bound to do if not continued. The fact, therefore, is of no importance to the question before us; and it will hardly be contended, we think, that any mental determination on the part of the court, unrecorded and unannounced, could be taken as continuance of his appointment. Such a doctrine would be too great an outrage upon the rights of the sureties, who would have a right to look to the record to ascertain the continuance or non-continuance of their liability.

Another point must be noticed. Nelson, one of the defendants, filed the following plea, verified by oath, viz: "that the said supposed writing obligatory in the declaration mentioned was signed by him upon condition that twelve or fifteen other good men signed it, which was not done; and that unless said number of persons did sign it, it was not to be considered his deed." Demurrer to the plea sustained.

This plea admits the signature of the bond, and does not deny that the same was delivered to the obligee. When so signed and delivered it became absolute. Petersdorf, vol. 9, p. 109, n., says, "If the delivery be to the party himself, it is no escrow; see Hob. 246; Cro. Eliz. 520; for it makes the deed absolute. See 1 Dyer, 34, pl. 25." Pauling et al. v. United States, 4 Cr. 219, and Moss v. Riddle, 5 id. 351, are to the same effect. The demurrer to this plea was rightly sustained.

Per curiam.—The judgment is affirmed, with costs, etc.

CHAPTER IX.

THE PLAINTIFF'S SECOND PLEADING, THE CLOSING OF THE ISSUES, AND JUDGMENT.

Replication, Sufficiency, and Effect of Demurrer.

CLEARWATER v. MEREDITH.

1 Wall. 25 (U. S.). 1863.

Plaintiff brought suit on a guaranty made by defendant Meredith that the stock of the Cincinnati, Cambridge & Chicago Short Line Railroad Company, two hundred shares of which had been transferred by the defendant to the plaintiff in payment of a farm, should be worth par, $50 per share, in Cincinnati, on October 1, 1855. The plaintiff alleged that the shares were at that date worthless. The defendant pleaded, among other things, that the said railroad company had consolidated with another company, under the laws of Indiana, whereby said stock had become of no value, and that said consolidation was with plaintiff's acquiescence and consent.

DAVIS J. In order to arrive at a correct solution of this question, it is important to consider whether the plea is a good one; for a demurrer, whenever interposed, reaches back through the whole record, and "seizes hold of the first defective pleading." The plea in controversy confesses the original cause of action, but sets up matter which has arisen subsequent to it to avoid the obligation to perform it. It acknowledges that the guaranty was given as claimed, but insists that the consolidation of the interests and stock of the three railroad companies necessarily destroyed and rendered worthless and of no value the guaranteed stock, and that Clearwater, having consented to the transfer, is in no position to claim redress from Meredith and his co-defendants. * * *

But it is said that the plea is defective because it does not aver that the consolidation was an act done without the consent of the defendants. The pleadings do not aver that the defend-

ants were stockholders in any of the roads whose interests were merged, and, if they were not, it is not easy to see what right they had to interpose objections to consolidation, nor how their consent was necessary to carry out the object contemplated. If the plaintiff consented because they did, and it is meant to be argued on that account they would still be liable on their contract, the answer is that this is not a matter to be negatived by the defendants, but the plaintiff should reply the fact. 1 Chit. Pl. 222.

It follows that the fifth plea presented a complete defense in bar of the action.

In this plea there were two points and two only which the plaintiff had the right to traverse. He could deny either the act of consolidation or that he gave his consent to it. He could not deny both, for that would make his replication double. And if either fact was untrue, the defense was destroyed. The truth of both was essential to perfect the defense. But traverse can only be taken on matter of fact, and it is always inadmissible to tender an issue on mere matter of law. 1 Chit. Pl. 654.

The last replication does traverse a conclusion of law. Whether the stock of the Cincinnati, Cambridge & Chicago Short Line Railway Company was destroyed and rendered worthless and of no value was not a question for a jury to try. If the roads were consolidated with the consent of the plaintiff, then it followed as a conclusion of law that the stock was destroyed and of no value. The stock passed out of existence the very instant the new corporation was created. The issue, therefore, tendered by the plaintiff in his last replication was an immaterial one, and the court did not err in sustaining a demurrer to it.

But the plaintiff claims the right to have the decision of the court below on the sufficiency of his replications reviewed here. This he cannot do. Each replication in this cause is complete in itself; does not refer to, and is not a part of, what precedes it, and is new pleading. When the plaintiff replied de novo after a demurrer was sustained to his original replication, he waived any right he might have had to question the correctness of the decision of the court on the demurrer. In like manner he abandoned his second replication when he availed himself of the leave of the court and filed a third and last one.

But the plaintiff insists that even if his replication was bad,

that still upon the whole record he was entitled to judgment, because the first and fourth pleas were undisposed of. If an issue in fact had been joined on the fifth plea, and found for the defendants, judgment was inevitably for them, because the plea was in bar of the action, and the other pleas would then have presented immaterial issues. If the plea was true, being a complete defense, it would have been useless to have tried other issues, for, no matter how they might terminate, judgment must still be for the defendants. The state of pleading leaves the fifth plea precisely as if traverse had been taken on a matter of fact in it, and determined against the plaintiff. "On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading and found in favor of the same party." Gould's Pleading, ch. 9, § 42. "And when the defendant's plea goes to bar the action, if the plaintiff demur to it and the demurrer is determined in favor of the pleading, judgment of nil capiat should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action." Tidd's Practice (4th Am. ed.) 741-42. There is no error in the record.

Judgment affirmed, with costs.

LEADING ILLUSTRATIVE CASES LAW OF EVIDENCE

PART I

RULES OF EXCLUSION

CHAPTER II.

UNIMPORTANT, MISLEADING AND PREJUDICIAL MATTERS.

COLUMBIA, ETC., RAILROAD COMPANY v. HAWTHORNE.

144 U. S. 202. 1892.

Action to recover damages for a personal injury. Verdict and judgment for the plaintiff. Defendant brings error. Reversed.

This was an action brought in a district court of the territory of Washington against a corporation owning a saw-mill, by a man employed in operating a machine therein, called a "trimmer," to recover damages for the defendant's negligence in providing an unsafe and defective machine, whereby one of the pulleys, over which ran the belt transmitting power to the saw, fell upon and injured the plaintiff. The defendant denied any negligence on its part, and averred negligence on the part of the plaintiff.

At the trial, the plaintiff introduced evidence tending to show that the pulley, weighing about 50 pounds, revolved around a stationary shaft made of gas-pipe, with nothing to hold the pulley on but a common cap or nut, screwed on the end of the pipe, and its thread running in the same way as the pulley, and liable to be unscrewed by the working of the pulley; that the nut became unscrewed, and came off, so that the pulley fell

upon and greatly injured the plaintiff; and that if the nut had been properly put on, with a bolt through the shaft, the accident could not have happened.

The plaintiff's counsel asked a witness whether there had been any change in the machinery since the accident. Thereupon the following colloquy took place:

Defendant's counsel: "We object to that. The rule is well understood, and as your honor has already given it in other cases, that a person is not bound to furnish the best known machinery, but to furnish machinery reasonably safe. It is not a question as to what we have done with the machinery in the last few years or months since the accident occurred, but what was the condition then."

The Court: "The rule is quite well settled, I think, that where an accident occurs through defective machinery or defective fixtures or the machine itself, if that is shown to be true, then a change, repair, or substitution of something else for the defective machinery is admissible as showing or tending to show the fact. I think that is quite well settled."

Defendant's counsel: "I thoroughly concur with the court as to the rule."

Plaintiff's counsel: "We propose to show changes."

The Court: "I think it is admissible."

Defendant's counsel: "We will save an exception."

The Court: "Exception allowed."

The witness then answered that there had been changes since the accident, and that they consisted in putting a rod through the shaft, and gammon nuts on the end of the rod to keep the pulleys on, and in putting up some planks underneath the pulleys to keep them from falling down. To the admission of the evidence of each of these changes an exception was taken by the defendant and allowed by the judge.

At the close of all the evidence for the plaintiff (which it is unnecessary to state) the defendant moved "for a judgment of nonsuit, on the ground that the plaintiff had failed to prove a sufficient cause for the jury"; and an exception to the overruling of this motion was taken by the defendant and allowed by the court.

The defendant then introduced evidence, and the case was argued by counsel, and submitted by the court to the jury, who

returned a verdict of $10,000 for the plaintiff, upon which judgment was rendered. The defendant appealed to the supreme court of the territory, which affirmed the judgment. 3 Wash. T. 353, 19 Pac. 25. The defendant sued out this writ of error.

JUSTICE GRAY, after stating the fact in the foregoing language, delivered the opinion of the court.

The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is not entitled to recover cannot be made by the defendant as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error. Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493; Insurance Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685; Railroad Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321; Robertson v. Perkins, 129 U. S. 233, 9 Sup. Ct. 279.

The only other exception argued is to the admission of evidence of changes in the machinery after the accident.

It was argued for the plaintiff that this exception was not open to the defendant, because it had been waived by his counsel saying, after the first ruling of the court on the subject, "I thoroughly concur with the court as to the rule." Assuming these words to be accurately reported, it is not wholly clear whether they refer to the rule as to evidence of subsequent changes, or to the rule, mentioned just before, as to the degree of care required of the defendant. That they were not understood, either by the counsel or by the court, as waiving the objection to evidence of subsequent changes, is shown by the plaintiff's counsel thereupon saying, "We propose to show changes," and by the court ruling them to be admissible, and allowing an exception to this ruling, and immediately afterwards allowing two other exceptions to evidence on the same subject. And the question of the admissibility of this testimony was considered and decided by the supreme court of the territory. 3 Wash. T. 353, 364, 19 Pac. 25.

This writ of error, therefore, directly presents for the decision

of this court the question whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction.

Upon this question there has been some difference of opinion in the courts of the several states; but it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. Morse v. Railway Co., 30 Minn. 465, 16 N. W. 358; Corcoran v. Peekskill, 108 N. Y. 151, 15 N. E. 309; Nalley v. Carpet Co., 51 Conn. 524; Ely v. Railway Co., 77 Mo. 34; Railway Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608; Railroad Co. v. Clem, 123 Ind. 15, 23 N. E. 965; Hodges v. Percival, 132 Ill. 53, 23 N. E. 423; Lombard v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947; Shinners v. Proprietors, 154 Mass. 168, 28 N. E. 10.

As was pointed out by the court in the last case, the decision in Readman v. Conway, 126 Mass. 374, 377, cited by this plaintiff, has no bearing upon this question, but simply held that in an action for injuries from a defect in a platform, brought against the owners of the land, who defended on the ground that the duty of keeping the platform in repair belonged to their tenants, and not to themselves, the defendants' acts in making general repairs of the platform after the accident "were in the nature of admissions that it was their duty to keep the platform in repair, and were therefore competent."

The only states, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence, are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reasons. McKee v. Bidwell, 74 Pa. St. 218, 225, and cases cited; Railway Co. v. Weaver, 35 Kan. 412, 11 Pac. 408.

The true rule and the reasons for it were well expressed in Morse v. Railway Co., above cited, in which Mr. Justice Mitchell, delivering the unanimous opinion of the supreme court of Min-

nesota, after referring to earlier opinions of the same court the other way, said: "But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employés in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." 30 Minn. 465, 468.

The same rule appears to be well settled in England. In a case in which it was affirmed by the court of exchequer, Baron Bramwell said: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Railway, 21 Law T. (N. S.) 261, 263.

As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it, its admission requires that the judgment be reversed, and the case remanded to the supreme court of the state of Washington, with direction to set aside the verdict and to order a new trial.

CHAPTER IV.

CONFESSIONS.

ROESEL v. STATE.

62 N. J. L., 216. 1898.

The defendant was found guilty of murder and appealed. Affirmed.

DEPUE, J. * * * Error is assigned also on an exception taken to the admission of the testimony of John Keron. Keron was county detective, and had charge of the accused as a prisoner. His official position was disclosed and was well known to the prisoner. He first saw the prisoner in the Richmond county jail, Staten Island, on the 6th of October. He afterwards saw him in the Union county jail, and had conversations with him. The first of these conversations was on the 5th of January, 1898, in the presence of Mr. Blore, the warden, Chief of Police Stewart, Manshande, and Smith, the deputy warden, all of whom were public officers except Manshande and Roesel. Before the witness was allowed to testify to anything that the prisoner said, he was required by the court to detail the circumstances under which those conversations took place, with a view of ascertaining whether, in fact, the declarations of the prisoner were made under such circumstances as would allow them to be given in evidence.

On such preliminary examination, Keron testified that he told the prisoner he need not talk to him at all if he did not want to, that anything he said might be used either for or against him; that he told him also on Staten Island on two occasions; that he told him two or three times in jail "that he needn't speak to me at all about it, that I was an officer of the court, and from the office of the prosecutor." The witness further testified that he warned him "on every occasion he came to talk to me about it;" that he warned him the morning of the conversation of the 5th of January, and told him, "I was here

to talk with him with reference to this case, that he needn't talk to me at all if he didn't want to, and that whatever he said could be used either for or against him;" that he made no threats or promises to him. * * *

The promise or hope excited must relate to some benefit to be derived by the prisoner in the criminal prosecution. Though it is necessary to the admissibility of a confession that it should have been voluntarily made—that is, that it should have been made without the pressure of hope or fear from persons having authority—yet it is not necessary that it should have been the prisoner's own spontaneous act. It would be received, though it were induced by a promise of some collateral benefit or boon, no hope of favor being held out in respect to the criminal charge against him, or by any deception practiced on the prisoner, or false representation made to him for the purpose; provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, or lead the prisoner to suppose that it would be better for him to admit himself guilty of an offense which he had not committed. So, a confession is admissible though elicited by questions, whether put to the prisoner by a magistrate, officer, or private person; and the form of the question is immaterial to the admissibility, even though it assumes the prisoner's guilt. 1 Tayl. Ev. § 881; 1 Greenl. Ev. § 229; 1 Phil. Ev. 405, 406; Steph. Dig. Ev. pp. 53-59, arts. 22-24; Rosc. Cr. Ex. 48. That the accused was confined or in irons, under an accusation of having committed the murder, at the time of making his statement, will not of itself exclude it from being used as evidence. That fact is a circumstance not to be overlooked, as it may bear upon the inquiry whether the confession was voluntarily made, or was extorted by threats or violence, or made under the influence of fear. But confinement or imprisonment is not of itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. Whart. Cr. Ev. §§ 661-663; Sparf v. U. S., 156 U. S. 51-55. In all such cases the evidence may be laid before the jury, however little it may weigh under the circumstances, and however reprehensible may be the mode in which it was obtained. 1 Greenl. Ev. § 229; 1 Tayl. Ev. § 881.

But the contention is that the language used by Keron, "that

he need not talk to me at all if he did not want to, and that whatever he said could be used either for or against him," excluded the confession. Reg. v. Drew, 8 Car. & P. 140, is cited to sustain this contention. In that case it was held by Justice Coleridge that where the officer had said to the prisoner, "Do not say anything to prejudice yourself, as what you say I shall take down, and it will be used for you or against you at the trial," this disentitled the confession subsequently made to be used in evidence. This case, with two other kindred cases, was overruled by the court of criminal appeals. Reg. v. Baldry, 2 Den. Crown Cas. 430; 2 Bigelow, Lead. Cr. Cas. 484. In commenting on Reg. v. Drew and other similar cases, Mr. Taylor says: "In these and the like cases it is only too apparent that justice and common sense have been sacrificed on the shrine of mercy. Indeed, the judges themselves have of late years come to this conclusion, and, after a solemn discussion of the subject in the court of criminal appeal, they have expressly overruled the last three decisions cited above [Reg. v. Harris, 1 Cox, Cr. Cas. 106; Reg. v. Drew, 8 Car. & P. 140; Reg. v. Morton, 2 Moody & R. 514], as cases which are discreditable to the law." 1 Tayl. Ev. § 884. * * *

The prisoner's counsel also relied upon Bram v. U. S., 18 Sup. Ct. 182. The opinion in that case was delivered by Mr. Justice White. The rules of law controlling the subject, and the application of them to the facts of a particular case, are different questions. The learned justice does not call in question the rule adopted in the English courts, that a confession made by a prisoner to one in authority will not be excluded from being received in evidence where it is made to appear in the preliminary investigation that it was not procured by threats or induced by promises or advice having reference to some advantage the prisoner might secure on a criminal prosecution.

* * * * * * * * * * * *

It is apparent from the opinion of the learned justice that he did not regard the situation of Bram at the time inquiry was made of him as of itself excluding the confession, for he concedes that the mere fact that the confession was made to a police officer while the accused was under arrest, in or out of prison, or was drawn out by questions, did not necessarily render the confession involuntary. All that was claimed with respect to these facts was that such imprisonment or interrogation might

be taken into account in determining whether or not the statements of the prisoner were in fact induced by promises or threats that were made. * * * The decision, in fact, was made in subordination to the legal rule contended for,—that, to disqualify a confession from being in evidence, it must be obtained by means of threats or suggestions of some benefit or advantage in the criminal prosecution.

It is conceded that attempts on the part of police officers to obtain a confession by interrogation have been reproved by the courts as unfair to the prisoner, but not as excluding the confession. In all such cases the situation of the prisoner and the manner in which the confessions were obtained are a legitimate subject of comment before the jury as to the effect of the evidence. The truth of Keron's testimony in this case was, as will be seen presently, practically conceded by the prisoner. No request was made by counsel to instruct the jury to consider his testimony in the light of the manner in which the confession was brought about. The facts upon which the decision in Bram v. United States was made are entirely different from those before the court below when Keron's testimony was held to be competent. The prisoner was brought out of the jail, and, in the presence of public officials, was interrogated. He was told what Manshande had disclosed, and was asked if that was true. The blue pants were exhibited, and the prisoner was asked about them. Though this conduct of the officials may have been reprehensible, and might under some circumstances tend to impair before the jury the value of this evidence, it did not of itself render it illegal; for out of that situation no inference could be drawn of any threat on the part of Keron, or suggestion of any benefit that the prisoner might derive from any statement he might make in the pending prosecution. He was repeatedly informed and advised by Keron, in the most emphatic manner, that he need make no declaration or admission to him; that he need not answer any question that might be asked if he did not choose; that he need not say anything at all if he did not want to. The prisoner was at liberty to speak or not, as he saw fit, and his silence under such circumstances could not be made evidence against him. To affect one person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in

his presence or even to himself; but they must also have been made on an occasion when a reply from him might properly be expected. * * *

The burden of proof is on the State to show that the confession was voluntary. The preliminary examination, which is for the court, comprises a mixed question of law and fact. How far the determination of the question of fact by the court is a subject of review is a matter on which there is a conflict of decision.

* * * * * * * * * * * *

If the accused contends that the confession was improperly obtained, testimony on that subject may be introduced on the hearing of the preliminary question. People v. Fox, 121 N. Y. 449, 24 N. E. 923; Com. v. Culver, 126 Mass. 464. Persons other than the witness by whom it is proposed to prove the confession being present, their testimony may be offered, with a view of contradicting, explaining, or showing that the confession was so obtained that it should be either excluded, or, if received, the jury should be instructed to disregard it. If there be a conflict of evidence as to whether the confession was or was not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they should reject it if, upon the whole evidence, they were satisfied that it was not the voluntary act of the defendant. Wilson v. U. S., 162 U. S. 613; Hopt v. People, 110 U. S. 574-584. * * *

The confession was properly admitted in evidence. * * *

CHAPTER V.

HEARSAY.

BACON v. TOWNE ET AL.

4 Cushing 217 (Mass.). 1849.

Action for malicious prosecution. Verdict for the plaintiff. Defendants alleged exceptions. Verdict set aside.

SHAW, C. J. * * * In order to rebut malice and show probable cause, the defendants offered one Squires as a witness, who would testify that two women, Shaw's wife and Mary Randall, soon after the fire, and before the complaint, communicated to the witness, with a request that he would communicate to Towne, the fact, that they were present at the fire, and saw Bacon, the plaintiff, throw burning cotton into the picking-room of his factory, whereby it was burnt, and that he did so communicate the information to Towne before the complaint. The presiding judge rejected this evidence as inadmissible.

We cannot perceive upon what ground this evidence was rejected. It had a direct tendency to create a belief in the minds of the defendants of the plaintiff's actual guilt of the offense charged. The reason assigned by one of the defendants' counsel is, that it was hearsay; but we think, in the ordinary transactions of life, men do not hesitate to act on information until they put their informants upon oath, if, indeed, such oath would not be extrajudicial and unlawful.

The reason assigned by the other counsel is, that these women testified to the same facts before the magistrate. Without adverting to the fact that proof of such testimony was rejected, it was important for the defendants to show, that this information was communicated to them before the complaint, and, therefore, that they had reasonable expectation of being able to prove it. We think this evidence ought to have been received and laid before the jury. Broad v. Ham, 5 Bing. N. C. 722. * * * Verdict set aside and new trial ordered.

CHAPTER VI.

EXCEPTIONS TO THE RULE AGAINST HEARSAY.

MATTOX v. UNITED STATES.

146 U. S. 140. 1892.

In error to the district court of the United States for the district of Kansas. Reversed.

This was an indictment charging Clyde Mattox with the murder of one John Mullen, about December 12, 1889, in that part of the Indian Territory made part of the United States judicial district of Kansas by § 2 of the act of congress of January 6, 1883, (22 St., p. 400, c. 13,) entitled "An act to provide for holding a term of the district court of the United States at Wichita, Kansas, and for other purposes."

Defendant pleaded not guilty, was put upon his trial, October 5, 1891, and on the 8th of that month was found guilty as charged, the jury having retired on the 7th to consider of their verdict. Motions for a new trial and in arrest of judgment were severally made and overruled, and Mattox sentenced to death. This writ of error was thereupon sued out.

The evidence tended to show that Mullen was shot in the evening between 8 and 9 o'clock, and that he died about 1 or 2 o'clock in the afternoon of the next day; that three shots were fired and three wounds inflicted; that neither of the wounds was necessarily fatal, but that deceased died of pneumonia produced by one of them described as "in the upper lobe of the right lung, entering about two or three inches above the right nipple, passing through the upper lobe of the right lung, fracturing one end of the fourth rib, passing through and lodging beneath the skin on the right side beneath the shoulder blade." The attending physician, who was called a little after 9 o'clock and remained with the wounded man until about 9 o'clock in the morning, and visited him again between 8 and 9 o'clock, testified that Mrs. Hatch, the mother of Clyde Mattox, was present at that visit; that he regarded Mullen's recovery as hopeless; that

Mullen, being "perfectly conscious" and in a normal condition as regards his mind," asked his opinion, and the doctor said to him: "The chances are all against you; I do not think there is any show for you at all." The physician further testified, without objection, that, after he had informed Mullen as to his physical condition, he asked him as to who shot him, and he replied "he didn't have any knowledge of who shot him. I interrogated him about three times in regard to that—who did the shooting—and he didn't know." Counsel for defendant, after a colloquy with the court, propounded the following question: "Did or did not John Mullen, in your presence and at that time, say, in reply to a question of Mrs. Hatch, 'I know your son, Clyde Mattox, and he did not shoot me; I saw the parties who shot me, and Clyde was not one of them?'" This question was objected to as incompetent, the objection sustained, and defendant excepted. Counsel also propounded to Mrs. Hatch this question: "Did or did not John Mullen say to you, on the morning you visited him, and after Dr. Graham had told him that all the chances for life were against him. 'I know Clyde Mattox, your son, and he was not one of the parties who shot me?'" This was objected to on the ground of incompetency, the objection sustained, and defendant excepted.

* * * * * * * * * * *

CHIEF JUSTICE FULLER. [In part.]

Dying declarations are admissible on a trial for murder, as to the fact of the homicide and the person by whom it was committed, in favor of the defendant as well as against him. 1 East, P. C. 353; Rex v. Scaife, 1 Moody & R. 551; U. S. v. Taylor, 4 Cranch, C. C. 338; Moore v. State, 12 Ala. 764; Com. v. Matthews, 89 Ky. 287, 12 S. W. Rep. 333. But it must be shown by the party offering them in evidence that they were made under a sense of impending death. This may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. The length of time elapsing between the making of the declaration and the death

is one of the elements to be considered, although, as stated by Mr. Greenleaf, "it is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible." 1 Greenl. Ev. (15th Ed.) §§ 156, 157, 158; State v. Wensell, 98 Mo. 137, 11 S. W. 614; Com. v. Haney, 127 Mass. 455; Kehoe v. Com., 85 Pa. St. 127; Swisher v. Com., 26 Grat. 963; State v. Schmidt, 73 Iowa 469, 35 N. W. Rep. 590. In Reg. v. Perkins, 9 Car. & P. 395, the deceased received a severe wound from a gun loaded with shot, of which wound he died at 5 o'clock the next morning. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover, made no reply, but appeared dejected. It was held by all the judges of England that a declaration made by him at that time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis. There the declaration was against the accused, and obviously no more rigorous rule should be applied when it is in his favor. The point is to ascertain the state of the mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and, if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected. In this case the lapse of time was but a few hours. The wounds were three in number and one of them of great severity. The patient was perfectly conscious, and asked the attending physician his opinion, and was told that the chances were all against him, and that the physician thought there was no "show for you [him] at all." He was then interrogated as to who did the shooting, and he replied that he did not know. All this was admitted without objection. Defendant's counsel then endeavored to elicit from the witness whether, in addition to saying that he did not know the parties who shot him, Mullen stated that he knew Clyde Mattox, and that it was not Clyde who did so. The question propounded was objected to on the sole ground of incompetency, and the objection sus-

tained. In this, as the case stood, there was error. So long as the evidence was in the case as to what Mullen said, defendant was entitled to refresh the memory of the witness in a proper manner, and bring out, if he could, what more, if anything, he said in that connection. It was not inconsistent with Mullen's statement that he did not know the parties, for him also to have said that he knew Mattox was not one of them. His ignorance of who shot him was not incompatible with knowledge of who did not shoot him.

We regard the error thus committed as justifying the awarding of a new trial.

The judgment is reversed, and the cause remanded to the district court of the United States for the district of Kansas, with a direction to grant a new trial.

EVANSTON v. GUNN.

99 U. S. 660. 1878.

Action to recover damages alleged to have been sustained by reason of neglect of duty on the part of the defendant.

The plaintiff, for the purpose of showing the direction and velocity of the wind and the falling of snow in the morning in question and the previous evening, offered in evidence the record made by a person employed at Chicago by the United States Signal Service. The defendant objected, because there was no law authorizing the record to be used in evidence, and because the same was not competent testimony. The court overruled the objection, and the defendant excepted.

* * * * * * * * * * *

Verdict for the plantiff and judgment thereon. The defendant sued out a writ of error. Affirmed.

JUSTICE STRONG delivered the opinion of the court.

The admission in evidence of a record kept by a person employed by the United States Signal Service at Chicago was objected to at the trial, not because it had not been properly made, identified, and proved, but for the alleged reason that "there was no law authorizing such records to be used in evidence, and because it was not competent testimony." The defendants having thus specified their objection, it must be

considered that all others were waived, or that there was no ground upon which others could stand. Berks & Dauphin Turnpike Co. v. Myers, 6 Serg. & R. (Pa.) 12; Chicago & Alton Railroad Co. v. Morgan, 69 Ill. 492. We have then only to consider the objections that were made,—the only ones that appear in the bill of exceptions,—and they present the question whether the record, conceding it to be properly proved, was competent evidence. It may be admitted there is no statute expressly authorizing the admission of such a record, as proof of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sections 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the continent, and at other points in the States and Territories, for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports, and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the Rules of the Signal Service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence "official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation." Taylor, Evid., § 1429; 1 Greenl. Evid., § 483. To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. 1 Greenl. Evid., § 496. Nor

need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him. Galt v. Galloway, 4 Pet. 332. It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous. A few may be mentioned. De Armond v. Nesmith, 32 Mich. 231; Gurney v. House, 9 Gray (Mass.), 404; The Catharine Maria, Law Rep. 1 Ad. & Ec. 53; Clicquot's Champagne, 3 Wall. 114. We think, therefore, that there was no error in admitting the record kept by the person employed for the purpose by the United States Signal Service.

* * * * * * * * * * *

Judgment affirmed.

PRATT v. WHITE.

132 Mass. 477. 1882.

Plaintiff sued on an account annexed for goods sold and delivered by his intestate to the defendant and offered in evidence the book of original entries kept by his intestate, with his own oath and that of the intestate's clerk. Although no measure, weight or quantity was given in connection with the item charged on the book, the court received it in evidence over the defendant's objection.

Verdict for plaintiff. Defendant alleged exceptions. Exceptions overruled.

DEVENS, J. The admission of the books of account of a party to prove items of work done and goods delivered, when supported by his own oath, or, if he is deceased, that of his administrator or executor, has long been permitted in this state; and under various restrictions, some created by statute in all the states of the Union. It has been sanctioned as an exception to the general rule of law as it formerly existed that a party should not be a witness in his own case, and from supposed necessity, in order to prevent a failure of justice, that he shall be allowed to produce the record of his daily transactions, to many of which, on account of their variety and minuteness, it cannot be expected there will be witnesses.

It is for the court to decide upon the admissibility of the book offered, although the weight to be given to it afterwards must be

largely a question for the jury, in connection with its appearance, the manner in which it is kept, and the other evidence in the case. It must appear to have been honestly kept, and not intentionally erased or altered, and to have been the record of the daily business of the party, made for the purpose of establishing a charge against another. Necessarily, regard is to be had to the education of the party, his methods and knowledge of business, etc., in deciding this question. Cogswell v. Dolliver, 2 Mass. 217; Prince v. Smith, 4 Miss. 454.

The decision of the court to admit the book is final and conclusive, unless from its character, or from that which was sought to be proved by it, it could not have been admitted even if it met those tests. Although somewhat irregularly made a part of the exceptions to be examined by the court, the book has not been produced by the defendant for our inspection. It appears that measure, weight and quantity were not given in connection with the items of goods charged, but for this reason we are not prepared to say that it was inadmissible. If the book contain the record of the party, daily transactions made for the purpose of a charge, it may be admitted, even if deficient in many respects. It does not follow that, before a plaintiff can fairly ask a verdict, he may not be compelled to supply deficiencies in the evidence his book affords. This bill of exceptions does not show that other evidence was not introduced.

A time book which has only the name of the party and marks under particular dates has been admitted. Mathes v. Robinson, 8 Metc. (Mass.) 269. Upon the same principle, marks on a shingle or upon a notched stick have been admitted. Kendall v. Field, 14 Me. 30; 1 Greenl. Ev., §§ 118, 119. Yet without additional evidence, these would afford but incomplete proof of a claim. In Hooper v. Taylor, 39 Me. 224, a book similar to the one here in question in omitting the weight and quantity of articles was admitted with but little discussion.

There would seem to be no reason why a delivery of specific articles might not be shown by a book of accounts, even if more evidence were needed to show the amount which the plaintiff was entitled to recover. It is easy to imagine many facts in connection with which such charges might be very important. We have no reason to suppose more weight was given to them than that to which they were fairly entitled, and we must pre-

sume that the book was submitted to the jury under all proper instructions.

Exceptions overruled.

THE MAYOR, ETC., OF NEW YORK v. THE SECOND AVENUE RAILROAD COMPANY.

102 N. Y. 572. 1886.

Action to recover damages for an alleged breach of contract. Judgment for plaintiff. Affirmed.

ANDREWS, J. [In part.]

A more serious question is raised by exceptions to the admission in evidence of a time-book kept by one John B. Wilt, and of a written memorandum or account made by him, offered to prove the number of days' work performed, and the quantity of materials used. Wilt was a foreman in the employ of the department of public works, and had general charge of the repairs in question. Under him were two gang foremen, or head pavers, Patrick Madden and Charles Coughlan, each having charge of a separate gang of about ten men employed on the work.

Wilt kept a time-book, in which was entered the name of each man employed. He visited the work twice a day—in the morning and afternoon—remaining from a few minutes to half an hour each time; and he testified that while there he checked on the time-book the time of each man as reported to him by the gang foremen. He also testified that he marked the men's names as he saw them, and that he knew their faces.

The gang foremen did not see the entries made by Wilt, but they testified that they correctly reported to him each day the names of the men who worked, and, if any man did not work full time, they reported that fact also. Upon this proof the trial judge admitted the time-book in evidence, against the objection of the defendant.

The trial judge also admitted in evidence, under like objection, a written memorandum or account, in the handwriting of Wilt, of materials used. Wilt testified that the entries in the account were made from daily information presented by the gang foremen on the occasion of his visiting the work, and

that he correctly entered the amounts as reported. It does not appear that he had any personal knowledge of the matters to which the entries related. The gang foremen were called as witnesses in support of the account. Neither of them saw the entries, and on the trial neither claimed to have any present recollection of the specific quantities so reported by them. Madden testified that he reported the correct amounts to Wilt, and it is inferable from his evidence that, when the reports were made, he had personal knowledge of the facts reported. Coughlan also testified, in general terms, that he reported the items correctly. But on further examination it appeared that his reports to Wilt, of the stone delivered at the work, were made upon information derived by him from the carmen who drew the stone, and who counted them, and who reported the count to Coughlan, who in turn reported to Wilt. Coughlan saw the carmen dump the stone, but he did not verify the count, but appears to have assumed its correctness. The carmen who delivered the stone were not called as witnesses.

The exception to the admission of the time-book presents a question of considerable practical importance. The ultimate fact sought to be proved on this branch of the case was the number of days' labor performed in making the repairs. The time-book was not admissible as a memorandum of facts known to Wilt and verified by him. His observation of the men at work was casual, and it cannot be inferred that he had personal knowledge of the amount of labor performed. His knowledge from personal observation was manifestly incomplete, and the time-book was made up, mainly at least, from the reports of the gang foremen. The time-book was clearly not admissible upon the testimony either of the gang foremen or of Wilt, separately considered. The gang foremen knew the facts they reported to Wilt to be true, but they did not see the entries made, and could not verify their correctness. Wilt did not make the entries upon his own knowledge of the facts, but from the reports of the gang foremen. Standing upon his testimony alone, the entries were mere hearsay. But, combining the testimony of Wilt and the gang foremen, there was—First, original evidence that laborers were employed, and that their time was correctly reported, by persons who had personal knowledge of the facts, and that their reports were made in the ordinary

course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions to which the reports related; and, second, evidence by the person who received the report that he correctly entered them, as reported, in the time-book—the usual course of his business and duty. It is objected that this evidence taken together, is incompetent to prove the ultimate fact, and amounts to nothing more than hearsay. If the witnesses are believed, there can be but little moral doubt that the book is a true record of the actual fact. There could be no doubt whatever, except one arising from infirmity of memory, or mistake or fraud. The gang foremen may, by mistake or fraud, have misreported it to Wilt, and Wilt may, either intentionally or unintentionally, have made entries not in accordance with the reports of the gang foremen. But the possibility of mistake or fraud on the part of witnesses exists in all cases, and in respect to any kind of oral evidence.

The question arises, must a material ultimate fact be proved by the evidence of a witness who knew the fact, and can recall it, or who, having no personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made, an entry of the fact at the time, or recently thereafter, which, on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made; or may such ultimate facts be proved by showing, by a witness, that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another at the time, but had forgotten them, and supplementing this testimony by that of the person receiving the communication to the effect that he entered, at the time, the facts communicated, and by the production of the book or memorandum in which the entries were made?

The admissibility of memoranda of the first class is well settled. They are admitted in connection with and as auxiliary to the oral evidence of the witness; and this, whether the witness, on seeing the entries, recalls the facts, or can only verify those entries as a true record made or seen by him at or soon after the transaction to which it relates. Halsey v. Sinsebaugh, 15 N. Y. 485; Guy v. Mead, 22 N. Y. 462.

The other branch of the inquiry has not been very distinctly

adjudicated in this state, although the admissibility of entries made under circumstances like those in this case was apparently proved in Payne v. Hodge, 71 N. Y. 598. We are of opinion that the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account, kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts that the transactions of business in numerous cases are authenticated, and business could not be carried on and accounts kept, in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity, be kept by a person not cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or for other reasons it may be inconvenient that he should keep the account. It may be assumed that a system of accounts based upon substantially the same methods as the accounts in this case, is in accordance with the usages of business. In admitting an account verified as was the account here, there is little danger of mistake, and the admission of such an account as legal evidence is often necessary to prevent a failure of justice. We are of opinion, however, that it is a proper qualification of the rule admitting such evidence that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested. * * *

The judgment is therefore affirmed. All concur.

WILLIAMS v. GREAT NORTHERN RY. COMPANY.

68 Minn. 55. 1897.

Action to recover damages for personal injuries. Verdict for plaintiff. Defendant appealed. Reversed.

MITCHELL, J. * * * The record and assignments of error present but two questions: First, whether the court erred in admitting in evidence, in favor of the plaintiff, certain complaints and statements made by him to third parties descriptive of his pain and suffering, and of the effect and symptoms of his injuries; second, whether the damages awarded were excessive.

* * * * * * * * * * * *

The question as to the circumstances under which expressions or declarations of pain and suffering are admissible in evidence in behalf of the person making them is one of much importance, especially in view of the rapid growth of personal injury suits, and the increased frequency with which physicians are called as expert witnesses.

At the outset it is necessary to note the distinction, often overlooked, between mere descriptive statements of pain, or other subjective symptoms of a malady which furnish no intrinsic evidence of their existence, and those exclamations or complaints which are the spontaneous manifestations of distress, and which naturally and instinctively accompany and furnish evidence of existing suffering. Exclamations and expressions of the latter kind are the natural language of pain; and, whenever its existence at any particular time is a relevant fact, such manifestations of it are always admissible as original evidence, under the ordinary application of the rule of res gestæ. They are in the nature of verbal acts, and may always be testified to and described by any person in whose presence they were uttered. We take it that it is expressions of this nature to which Mr. Greenleaf refers when he says: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they are the natural language of the affection, whether of the body or the mind, they furnish satisfactory evidence, and often the only proof, of its existence; and whether they were real or

feigned is for the jury to determine." Greenl. Ev., § 102. It may not always be easy to draw the line between such complaints or expressions and mere descriptive statements, but the authorities all recognize and make the distinction, which is one that accords with the experience and observation of every one. Hagenlocher v. Railroad Co., 99 N. Y. 137, 1 N. E. 536; Roche v. Railroad Co., 105 N. Y. 294, 11 N. E. 630.

The question when, if ever, mere descriptive statements of pain or other subjective symptoms of malady are admissible in evidence, is one of more doubt and difficulty. In the latter part of the section just cited Mr. Greenleaf says: "So, also, the representations by a sick person of the nature, symptoms, and effects of the malady under which he is laboring at the time are received as original evidence. If made to a medical attendant, they are of greater weight as evidence; but, if made to any other person, they are not on that account to be rejected." This cannot be sustained under the rule of res gestæ. It is therefore clearly an exception to the rule excluding hearsay evidence.

* * * * * * * * * * *

Abuses resulting from receiving in evidence simple descriptive statements of pain and suffering, or other symptoms and effects of an injury or malady, and the fact that the necessity for their admission has been mainly removed by statutes making parties competent witnesses in their own behalf, have led to a re-examination and material limitation of the former rule. According to the great weight of modern authorities, the mere descriptive statements of a sick or injured person as to the symptoms and effects of his malady are only admissible under the following circumstances: First. They must have been made to a medical attendant for the purposes of medical treatment. Second. They must relate to existing pain or other symptoms from which the patient is suffering at the time, and must not relate to past transactions or symptoms, however closely related to the present sickness. This was probably always the rule, but the courts are now disposed to apply it more strictly than formerly. Third. Such statements are only admissible when the medical attendant is called upon to give an expert opinion based in part upon them. He cannot merely testify to the statements, and then stop. In the absence of any expert opinion based on the statements, they stand on the same footing as if made to a non-expert witness.

We find no case which expressly and directly announces this proposition, but we think it is clearly implied, and logically follows, from the fact that such statements are held to be admissible only when made to a person of scientific medical knowledge. Moreover, there is a practical reason for such a rule. A physician has both the ability and opportunity of observing and ascertaining whether the patient's statements of subjective symptoms correspond with the objective symptoms, and hence of forming a fairly accurate opinion as to whether such statements are true or false; and when he comes to give his expert opinion, presumably he will base it on such statements only so far as he believed them to be true. He might truthfully and safely testify that the patient made certain statements to him, and yet be unwilling to venture an opinion that they were true, or, if true, that such symptoms were caused by or in any way connected with the injury complained of.

So far as we can discover, this is as far as any of the courts have ever gone in modifying or limiting the former rule on this subject, even in jurisdictions where parties are competent witnesses in their own behalf. Some of these limitations are perhaps illogical and inconsistent on principle with the retention of any part of the old rule. Strong reasons can be urged in favor of wiping out the rule altogether, and putting statements to medical attendants on the same footing as those made to any one else, and holding them competent only when admissible under the ordinary application of the rule of res gestæ, and thus place the whole subject under the general rules of evidence. If the question was res integra in this State, we are strongly inclined to think that we would so hold; but we have repeatedly held, expressly or impliedly, that statements made in the manner and under the circumstances above indicated are competent evidence. Jones v. Railway Co., 43 Minn. 281, 45 N. W. 444; Johnson v. Railway Co., 47 Minn. 430, 50 N. W. 473; Brusch v. Railway Co., 52 Minn. 512, 55 N. W. 57; Cooper v. Railway Co., 54 Minn. 379, 56 N. W. 42; Firkins v. Railway Co., 61 Minn. 31, 63 N. W. 172; Miller v. Railway Co., 62 Minn. 216, 64 N. W. 554.

It is true that in none of these cases did we discuss or consider the question at any length, but merely voiced the apparently unanimous sentiments of other courts, and assumed that

such was the settled law. But after the highest appellate court of a state has so often passed upon a question, and especially where its decisions are in accordance with an unbroken line of authorities in other jurisdictions, trial courts and counsel have a right to assume that the law on that point is settled, and to govern themselves accordingly in the trial of causes. Therefore we might feel compelled, under the doctrine of stare decisis, to hold such statements admissible in evidence so far as we have already so decided, but no further. An examination of all the cases referred to, when the language of the court is read and construed in the light of the particular facts of each case, will show that we have never held such statements competent evidence, except under circumstances and subject to the limitations already suggested.

It only remains to apply the rules to the facts of this case:—

First. The plaintiff's wife being a non-expert witness, it was only competent for her to testify to such exclamations or complaints as were apparently the natural and instinctive manifestations of existing pain and suffering. * * *

Second. The part of Dr. Rutledge's answer which defendant's counsel moved to strike out was not responsive to the question put to him, which was limited to expressions of pain.

* * * * * * * * * * *

There is another serious objection to allowing this hearsay evidence to go to the jury. Dr. Rutledge was not called on to give an expert opinion as to the nature, cause, or extent of plaintiff's injuries. He was merely called on to testify to plaintiff's objective symptoms, which he personally observed, and to statements of the plaintiff himself, and was then dismissed from the witness stand. Therefore his testimony as to plaintiff's statements stood in the same position as if given by a non-expert witness, from whose lips it would have been pure hearsay. It went to the jury without even the safeguard of the expert opinion of the witness as to its truth or falsity, or as to the physical condition of the plaintiff based upon it. How much of this very large verdict may have been awarded on account of this unsworn and uncorroborated statement of the plaintiff it is impossible to tell, but the case illustrates with exceptionable force the danger and injustice of allowing such statements to be given in evidence. * * *

WALDELE v. THE NEW YORK CENTRAL & H. R. R. R. COMPANY.

95 N. Y. 274. 1884.

Action to recover damages for death of plaintiff's intestate alleged to have been caused by defendant's negligence. Verdict for plaintiff.

Defendant appealed from judgment of the General Term of the Supreme Court. Judgment reversed.

The facts, so far as material, are stated in the opinion.

EARL, J. The intestate came to his death from injuries received on defendant's railroad in the city of Rochester, near midnight, July 1, 1876. He was an educated deaf-mute, intelligent, and in possession of all his faculties, except that of speech and hearing. He was familiar with the railroad at the place where he was injured; and was probably attempting to cross the railroad on his way home at the time he was struck by an engine and fatally injured. No one saw the accident; but the theory of the plaintiff is, that as he approached the railroad tracks, a freight train came from the east, and he waited for that to pass, and then started to cross the track and was struck by an engine backing in the same direction at a distance of about fifty feet in the rear of the train. The manner of the accident, and whether it was caused solely by the negligence of the defendant, without any contributory negligence on the part of the intestate, were matters of controversy at the trial. The evidence to support the theory of the plaintiff was all circumstantial, except declarations of the intestate which were read in evidence.

Shortly after the passage of the train and the engine, the groans of the intestate were heard, and he was found lying upon the southerly or outer track of the railroad, about fifteen feet from the sidewalk, badly bruised and mangled. He was soon removed to the sidewalk, and afterward to the hospital, where he died in about three hours. After he was removed to the sidewalk, his brother, also a deaf-mute, was sent for; and about thirty minutes after the accident, he there obtained from him, by signs, the declarations the reception of which in evidence are complained of as error. He was produced by plaintiff as a

witness and was asked: "What did he tell you?" To this defendant's counsel objected, on the grounds "(1) that the declarations of the deceased are incompetent; (2) that they are no part of the res gestæ; (3) that whatever the conversation may have been, it took place at a time considerably subsequent to the time of the injury, at a place other than where the injury occurred; (4) that the evidence is inadmissible for any purpose." The court overruled the objections, and the defendant's counsel excepted. The counsel further objected to the reception of the evidence, "upon the ground that the declarations of the deceased are not competent for the purpose of establishing either negligence on the part of the defendant, or absence of negligence on the part of the deceased." The court overruled the objection, and defendant's counsel again excepted. The witness then answered: "John said he got hit! John said there was a long train, that he stood waiting for it to go, and an engine followed and struck him." The counsel in objecting to this evidence, and the court in ruling upon the objections, must have known what evidence was sought to be elicited by the question, as the case had before been tried, and the same evidence had been given. 19 Hun, 69. It is not disputed that this evidence was quite material, and we cannot say that it was not very damaging to the defendant upon a vital issue. Was it competent? We think not.

The claim that the declarations can be treated as part of the res gestæ is not supported by authority in this State. The res gestæ, speaking generally, was the accident. These declarations were no part of that,—were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them. Nothing was then transpiring or evident to any witness which could confirm the declarations, or by which upon cross-examination of the witness testifying, or by the examination of other witnesses, the truth of the declarations could be tested.

It is not easy always to determine when declarations may be received as part of a res gestæ, and the cases upon this subject

in this country and in England are not always in harmony. The case of Commonwealth v. McPike, 3 Cushing, 181, and Insurance Company v. Mosley, 8 Wall. 397, are extreme cases upon one side, and would justify the reception of these declarations. The case of Regina v. Bedingfield, 14 Cox's Cr. Cases, 341, is an extreme case upon the other side, and goes much further than would be needed to justify the exclusion of these declarations. That case was decided by Lord Chief Justice Cockburn, after consulting with Field and Manisty, JJ., and aroused much discussion and criticism in England. Bedingfield's Case, 14 Am. Law Review, 817; 15 Id. 71.

The rule as to res gestæ laid down in Commonwealth v. McPike, has since been limited, and very properly applied in other cases in that State. In Lund v. Tyngsborough, 9 Cush. 36, in view of the frequent recurrence of questions in regard to the admission of declarations claimed to be part of some res gestæ, the court undertook to set forth and illustrate with some particularity the principles and tests by which such questions must be determined, and among other things said: "When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations as a part of the transaction to explain the particular fact, distinguish this class of declarations from mere hearsay;" and further: "Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction; and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it." In Commonwealth v. Hackett, 2 Allen 136, upon a trial for murder, a witness testified that, at the moment the fatal stabs were given, he heard the victim cry out "I am stabbed," and he at once went to him and reached him within twenty seconds after that, and then heard him say, "I am stabbed—

I am gone—Dan Hackett has stabbed me." This evidence was held competent as part of the res gestæ. Bigelow, C. J., speaking of this evidence, said: "If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declarations or exclamations of the deceased may fairly be deemed a part of the same sentence as that which followed instantly, after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement contemporary with the same transaction, forming a natural and material part of it, and competent as being original evidence in the nature of res gestæ." The learned judge also said that the rule which renders res gestæ competent has been often loosely administered by courts of justice so as to admit evidence of a dangerous and doubtful character; and that the tendency of recent decisions has been to restrict within the most narrow limits this species of testimony; and that that court was disposed to apply the rule strictly, and to exclude everything which did not clearly come within its just and proper limitations. In these cases (the last two) I think the rule under consideration was correctly laid down and applied, and properly defined and limited. In Rockwell v. Taylor, 41 Conn. 55, the rule was laid down thus: "To make declarations on this ground admissible, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and to so harmonize with them as to constitute a single transaction." In Hanover Railroad Company v. Coyle, 55 Penn. St. 396, the action was against a railroad company for injuring the plaintiff by negligence; and the trial court admitted declarations of the engineer by whose negligence the plaintiff was injured, made at

the time of the injury, as part of the res gestæ; and it was held that they were properly admitted. Agnew, J., writing the opinion and speaking of the declaration of the engineer, said: "It was made at the time of the accident, in view of goods strewn along the road by the breaking of the boxes; and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself." * * *

I have now called attention to the principal authorities in this State, upon the doctrine of res gestæ evidence, and I have examined all the other cases which have been reported in this State relating to the doctrine, and I confidently assert that there is no authority in this State for holding that this evidence was competent. Here the res gestæ, strictly and accurately speaking, was not the fact that the intestate was injured, nor the fact that he was injured by coming in collision with the engine. These facts were apparent and undisputed. But the point of inquiry was, how he came to be hit by the engine, with the view of ascertaining whether the accident was solely due to the negligence of the defendant, or partly or wholly due to the negligence of the intestate. The manner of the accident was, therefore, the res gestæ to be inquired into; and these declarations made after the accident had happened, after the train had passed from sight, and the whole transaction had terminated, were no part of that res gestæ, had no connection with it, and were purely narrative. It has been well said that res gestæ must be a res gestæ that has something to do with the case, and then the declaration must have something to do with the res gestæ. It cannot be said that these declarations were in such manner connected with the res gestæ as to constitute one transaction so that they and the res gestæ were parts of the same transaction. They were not made under such circumstances that they are in any way confirmed by the res gestæ, and they had no relation to what was then present, or had just gone by. Suppose the intestate had been found at that point with a mortal wound freshly inflicted by some person; and he had charged that an individual, naming him, had thirty minutes before caused the

wound; would that declaration have been competent upon the trial of the person thus charged with the murder? Clearly not, within principles laid down in the cases which I have cited. Suppose in this case the person had been found there with a wound upon his head; and he had stated that the engineer upon one of these engines had struck him, as the engine passed, and the engineer had been upon trial for the offence; would the declaration have been competent? It makes no difference that the intestate had died, and could not therefore be called as a witness. If these declarations were competent, they would have been no less competent if he had survived and brought action himself, and had been a witness upon the trial. Suppose the engineer upon the engine which struck the defendant had, at the precise time when these declarations were made, also made declarations either favorable or unfavorable to the defendant, could they have been given in evidence as a part of the res gestæ? In view of the authorities which I have cited, that will not be claimed, and yet if these declarations were competent, those made at the same time by the engineer would have been competent; and this illustrates, too, how important it is that a correct rule upon this subject should be laid down in this case.

This evidence cannot be received upon the theory that there is a very strong probability that the declarations made by the intestate were true. The probability would have been equally strong if they had been made several hours later when he was removed to the hospital. The probability is that as he neared his death, he would have told the truth, if he said anything about it. The same may be said of many statements not under oath. They are frequently made under such circumstances as entitle them to very great, and frequently to implicit confidence; and yet they do not answer the requirements of the law,—that a party prosecuted shall be confronted with the witnesses, shall have an opportunity of cross-examination, and that the evidence against him shall be given under the test and sanction of a solemn oath. Declarations which are received as part of the res gestæ are to some extent a departure from or an exception to the general rule; and when they are so far separated from the act which they are alleged to characterize that they are not part of that act or interwoven into it by the surrounding circumstances so as to receive credit from it and from the surround-

ing circumstances, they are no better than any other unsworn statements made under any other circumstances. They then depend entirely upon the credit of the person making them and of the persons who testify to them, and hence are of no more value as evidence in a legal proceeding than the unsworn declarations of a person under any other circumstances.

Even dying declarations are not received in civil actions unless part of the res gestæ. Such declarations made in the immediate presence of death, under the most solemn circumstances, when all motive to pervert the truth may be supposed to have ceased to operate, are received only in trials for homicide of the declarant in cases where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. It is said that the reasons for thus restricting the rule may be that credit is not in all cases due to the declarations of a dying person, for his body may survive the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or for the sake of ease, and to be rid of the importunity and annoyance of those around him, he may say, or seem to say, whatever they may choose to suggest. The rule admitting dying declarations as thus restricted stands only upon the ground of the public necessity of preserving the lives of the community by bringing man-slayers to justice. Greenl. on Ev. s. 156.

There is no middle ground for receiving declarations of this character,—that is, they must be received either as dying declarations or as declarations forming part of the res gestæ.

But it is said that although this evidence may have been incompetent to show how the accident happened, it was competent to explain the condition of the intestate at the time he made the declarations. It is clear, however, that they were not received for that purpose. There was no dispute about his condition. It was not questioned that he was badly mangled and bruised, and that his injuries were received upon the defendant's railroad by contact with one of its engines; and so far as the declarations tended to show that he was simply hit by an engine, and received his injuries in that way, they were wholly unnecessary and immaterial. The sole point of the evidence was to show that he approached the track, waited for a long train to pass, and then in attempting to cross the track, was struck by an

engine backing in the same direction, thus making a question for the jury as to the contributory negligence on his part. For that purpose the evidence was incompetent, and that was the sole purpose, manifestly, for which it was offered or received. Suppose the intestate had been found there with a mortal stab inflicted half an hour before, and he had said, "I am stabbed; John Doe did it!" and the evidence had been objected to and received, would it have been an answer to say that it was competent to show his then present condition, and that the whole evidence should not, therefore, have been excluded? The stab would have been apparent, and the declarations wholly immaterial and unnecessary to show it, and the sole purpose and effect of the evidence would have been to show who the murderer was. So here the evidence was given for the sole purpose of showing what took place at the time the intestate was injured, and not for the purpose of characterizing his condition at the time he spoke.

We are, therefore, of opinion that an important rule of evidence was violated in receiving these declarations, and that upon that ground the judgment should be reversed and a new trial granted.

All concur, except Rapallo, J., not voting, and Danforth, J., not sitting. Judgment reversed.

CHAPTER VII.

OPINION.

CONNECTICUT, ETC., INSURANCE COMPANY v. LATHROP.

111 U. S. 612. 1884.

In error to the Circuit Court of the United States for the Western District of Missouri.

HARLAN, J. This is a writ of error from a judgment in favor of Helen Pitkin, the beneficiary in two policies issued by the Connecticut Mutual Life Insurance Company upon the life of her husband,—one, on the tenth day of August, 1866, for the sum of $5,000; and the other, on the twenty-fourth day of September, 1873, for the sum of $423. The insured, George E. Pitkin, died on the twenty-ninth day of September, 1878. After the case came here, the beneficiary in the policies died, and there was a revivor against her personal representative. The defense was the same as to each policy. Briefly stated, it is this: That the policy expressly provides that in case the insured shall, after its execution, become so far intemperate as to impair his health, or induce delirium tremens, or should die by his own hand, it shall be void and of no effect; that, after its execution and delivery, he did become so far intemperate as to impair his health, and induce delirium tremens; also, that he died by his own hand, because, with premeditation and deliberation, he shot himself through the heart with a bullet discharged by himself from a pistol, by reason whereof he died. Further, that the affirmative answer by plaintiff, in her application for insurance, to the question whether the insured was then and had always been of temperate habits, being false and untrue, the contract was annulled, because, by its terms, the policy was to become void if the statements and representations in the application—constituting the basis of the contract between the parties—were not in all respects true and correct. The plaintiff, in her reply, put in issue all the material allegations of the answer, except

that alleging the self-destruction of her husband; as to which she averred that, "at the time he committed said act of self-destruction, and with reference thereto," he "was not in possession of his mental faculties, and was not responsible for said act."

At the close of the evidence introduced for the plaintiff, the defendant, by counsel, moved the court to instruct the jury that upon pleadings and evidence the plaintiff could not recover. That motion was denied, and the action of the court—to which the defendant at the time excepted—is assigned for error. This instruction, it is claimed, should have been given upon the ground that the evidence disclosed no symptom whatever of insanity upon the part of the insured. But that position cannot be sustained upon any proper view of the testimony. There certainly was evidence tending to show a material, if not radical, change for the worse in the mental condition of the insured immediately preceding his death. In the judgment of several who knew him intimately, and had personal knowledge of such change, he was not himself at the time of the act of self-destruction. Whether his strange demeanor immediately before his death was the result of a deliberate, conscious purpose to feign insanity, so as thereby the more readily to defraud the company, was a matter peculiarly within the province of the jury to determine. If the refusal of the court to sustain the motion would have been error, had there been an entire absence of proof to sustain the plaintiff's suit, it is sufficient to say that there was evidence of a substantial character tending to show that the insured was insane when he took his life.

In Insurance Co. v. Rodel, 95 U. S. 238, where the question was made as to the duty of the court, on a motion by the defendant for a peremptory instruction based wholly on plaintiff's evidence, it was said that "if there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death, the judge was not bound to, and, indeed, could not properly, take the evidence from the jury. The weight of the evidence is for them, and not for the judge, to pass upon."

The case clearly comes within the rule announced in Insurance Co. v. Doster, 106 U. S. 32, 1 Sup. Ct. 18, that "where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, un-

der proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound legal discretion, to set aside a verdict returned in opposition to it."

When the evidence was concluded on both sides the defendant submitted requests for instructions. Some of them were given and some refused, but it does not appear from the record which were given and which refused. As the exception which was taken related to the refused instructions, and since it does not appear which of them belonged to that class, none of the series asked by defendant can be noticed. We may, however, remark that the charge of the court, to which no exception was taken, embodied all of defendant's instructions that were applicable to the case, and which could properly have been given.

This brings us to the consideration of the substantial questions presented by the assignments of error. They relate to the admission, against the objections of the defendant, of certain evidence touching the condition of the mind of the insured at or about the time he destroyed his life.

Before the introduction of the particular testimony to which the objections related, there was, as we have already said, proof tending to show that Pitkin was not entirely sound in mind. Witnesses well acquainted with him remarked the unusually excited, wild expression of his face. A domestic in his family testified that "he looked very wild and frightened out of his eyes; he looked like some one that was crazy." Within a few hours before death he bade one witness, whose store he visited, goodbye, saying that he was "going to a country, where there is no return." To another witness, on the same occasion, he appeared to be "out of his head; kind of mad, insane."

At this stage of the case one Strein was introduced as a witness for plaintiff. Pitkin was in his saloon about 11 o'clock of the day on which he took his life, and a few hours only before his death. So much of his examination (omitting the questions) as is necessary to a proper understanding of the objections made by plaintiff in error is here given: "Answer, He asked for a glass of wine, and I gave it to him. He said he hadn't had a drink yet that day, or since the one he had last night from me,—that was a glass of wine. He said, 'I may look queer this morn-

ing or drunk to other people, but I ain't drunk.' He said, 'Some people may think me drunk, but I am not; I am not drunk in my body, but I am in my mind.' He looked unusual to me. He had on his old clothes, and his neck-tie was out of shape, his face was red, and his eyes staring at me, which made me think he was quite out of his usual way. His appearance and the look was quite different from his usual appearance prior to that time. He looked, in his face, quite red, and his eyes had quite another expression. He had them open wide, with a look that was wild, and he looked around the room awhile and walked up and down, and seemed very restless. He would not stand at one place like he usually did, but walked up and down. I spoke a few words after that, but I did not notice him very much, for I was very busy." The witness being asked to state the impression made upon him by what he saw of Pitkin's condition, the defendant objected to the question as incompetent. But the objection was overruled, and an exception was taken. The witness answered: "My impression was that he seemed to be quite out of his head that morning. I could not say the reason. I didn't know then anything about his disappointment; I found that out afterwards."

Another witness, Mr. Ferry, an attorney at law, was introduced by the plaintiff. He saw Pitkin the morning of the day he killed himself. What occurred was thus stated by him: "I came down Broadway, walking, and Mr. Pratt came down from his residence on Washington street, in a street car, and got out on the corner of Sixth and Broadway, and we went there in front of the office. Mr. Pitkin was standing very near the door, and as we passed up the stairway going to our office we both said, 'Good morning' to him, and Mr. Pratt says, 'Pit., why ain't you at church? Mr. Pitkin said, 'I am not going to church, I am going to hell;' and we immediately passed on up stairs and into the doorway, but as we started up stairs Pitkin stuck his head into the door and says, 'Do you want to send any word to him?' Mr. Pratt says, 'To whom?' 'To the devil; I am going to hell,' and he turned immediately and went out of the door." Being asked how Pitkin looked during that conversation, he said that "he seemed very much agitated and nervous; his face was flushed; the pupil of his eye dilated and bright, and there was no expression in it." Against the objections of defendant he was

permitted to testify that the impression left on his mind, from the conduct, actions, manner, expressions, and conversation of Pitkin was that "he was crazy, and didn't know what he was doing."

Exception was also taken to the action of the court in permiting the witness Aldrich to answer a certain question. He saw the deceased a few moments before his death, and observed that he "looked strange"; had "a very peculiar look," one that he had never seen before. It was "a wild look." Being asked what impression Pitkin made upon him by his manner and conduct at the time, he answered,—the defendant's objection to the evidence being overruled,—"I thought he was out of his head."

It is contended, in behalf of plaintiff in error, that the impressions and opinions of these non-professional witnesses as to the mental condition of the insured, although accompanied by a statement of the grounds upon which they rested, were incompetent as evidence of the fact of insanity. This question was substantially presented in Insurance Co. v. Rodel ubi supra, which was an action upon a life policy containing a clause of forfeiture in case the insured died by his own hand. The issue was as to his sanity at the time of the act of self-destruction. Witnesses acquainted with him described his conduct and appearance at or about, and shortly before, his death. They testified as to how he looked and acted. One said that he "looked like he was insane;" another, that his impression was that the insured "was not in his right mind." In that case the court said that "although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony, and expressed in an inartificial manner the impressions which are usually made by insane persons upon people of ordinary understanding." The general rule undoubtedly is that witnesses are restricted to proof of facts within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine, or which must constitute elements in such determination. To this rule there is a well-established exception in the case of witnesses having special knowledge or skill in the business, art, or science, the principles of which are involved in the issue to be tried. Thus the opinions of medical men are admissible in evidence as to the sanity or insanity of a person at a particular time, because

they are supposed to have become, by study and experience, familiar with the symptoms of mental disease, and therefore qualified to assist the court or jury in reaching a correct conclusion. And such opinions of medical experts may be based as well upon facts within their personal knowledge, as upon a hypothetical case disclosed by the testimony of others. But are there no other exceptions to the general rule to which we have referred?

Counsel for the plaintiff in error contends that witnesses who are not experts in medical science may not, under any circumstances, express their judgment as to the sane or insane state of a person's mind. This position, it must be conceded, finds support in some adjudged cases as well as in some elementary treatises on evidence. But, in our opinion, it cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every case, civil and criminal, which involves the question of insanity. Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense, and, we may add, the natural instincts of mankind reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation,—matters about which they may and do form opinions sufficiently satisfactory to constitute the basis of action. While the mere opinion of a non-professional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value; because the natural and ordinary operations of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached. It will also depend, in

part, upon the degree of the mental unsoundness of the person whose condition is the subject of inquiry; for his derangement may be so total and palpable that but slight observation is necessary to enable persons of ordinary understanding to form a reasonably accurate judgment as to his sanity or insanity; in other cases, the symptoms may be of such an occult character as to require the closest scrutiny and the highest skill to detect the existence of insanity.

The truth is, the statement of a non-professional witness as to the sanity or insanity, at a particular time, of an individual, whose appearance, manner, habits, and conduct came under his personal observation, is not the expression of mere opinion. In form it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner, and motions of another person, of which a correct idea cannot well be communicated in words to others without embodying, more or less, the impressions or judgment of the witness. But in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact; not, indeed, a fact established by direct and positive proof, because in most, if not all, cases it is impossible to determine, with absolute certainty, the precise mental condition of another; yet, being founded on actual observation, and being consistent with common experience and the ordinary manifestations of the condition of the mind, it is knowledge, so far as the human intellect can acquire knowledge upon such subjects. Insanity "is a disease of the mind which assumes as many and varied forms as there are shades of difference in the human character." It is, as has been well said, "a condition which impresses itself as an aggregate on the observer," and the opinion of one, personally cognizant of the minute circumstances making up that aggregate, and which are detailed in connection with such opinion, is, in its essence, only fact "at short-hand." 1 Whart. & S. Med. Jur. § 257. This species of evidence should be admitted, not only because of its intrinsic value, when the result of observation by persons of intelligence, but from necessity. We say from necessity, because a jury or court, having had no opportunity for personal observation, would otherwise be de-

prived of the knowledge which others possess; but, also, because, if the witness may be permitted to state—as, undoubtedly, he would be where his opportunities of observation have been adequate—"that he has known the individual for many years; has repeatedly conversed with him and heard others converse with him; that the witness had noticed that in these conversations he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without cause; and that in his conduct he was wild, irrational, extravagant, and crazy,—what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation, what reasonable cause of pleasure or resentment, and what the indicia of sound or disordered intellect? If he may not so testify, but must give the supposed silly and incoherent language, state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational, and thus, without the least intimation of any opinion which he has formed of their character, where are such witnesses to be found? Can it be supposed that those not having a special interest in the subject shall have so charged their memories with these matters, as distinct, independent facts, as to be able to present them in their entirety and simplicity to the jury? Or, if such a witness be found, can he conceal from the jury the impression which has been made upon his mind; and, when this is collected, can it be doubted but that his judgment has been influenced by many, very many circumstances which he has not communicated, which he cannot communicate, and of which he himself is not aware? Clary v. Clary, 2 Ired. Law 83. The jury, being informed as to the witness' opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice.

These views are sustained by a very large number of adjudications in the courts of this country. * * * While the cases are, to some extent, in conflict, we are satisfied that the rule most consistent with sound reason, and sustained by authority, is that indicated in this opinion.

PART II

FORMS IN WHICH JUDICIAL EVIDENCE MAY BE PRESENTED

CHAPTER IX.

DOCUMENTS.

BRIGHAM v. PALMER.

3 Allen 450 (Mass.). 1862.

Action to recover for a wagon sold and delivered. To prove his title to the wagon the plaintiff produced three chattel mortgages, all of which were attested by a competent witness who resided in a nearby town. The mortgages were received in evidence without having been proved by the subscribing witness. Verdict for plaintiff. Defendant alleged exceptions. Exceptions sustained.

HOAR, J. We think the defendant's exceptions upon two points are well taken, and that he is entitled to a new trial.

1. The rule that the execution of an instrument which is offered in evidence by one who is a party to it cannot be proved without calling the attesting witnesses, where they are living, competent, and within reach of the process of the court, is a fundamental rule of evidence in this Commonwealth, long ago established and strictly adhered to. Whitaker v. Salisbury, 15 Pick. 534; Homer v. Wallis, 11 Mass. 309.

In The King v. Harringworth, 4 M. & S. 354, Lord Ellenborough said that this rule "is as fixed, formal, and universal as any that can be stated in a court of justice." In Abbott v. Plumbe, 1 Doug. 216, Lord Mansfield said that it is a rule which "cannot be dispensed with." In Barnes v. Trompowsky, 7 T. R. 265, Lord Kenyon said: "We ought not to suffer this point to be called in question; it is too clear for discussion."

In the courts of New York, the rule has not been treated with much respect, though adhered to in the case of deeds. Henry v. Bishop, 2 Wend. 575. In that case Chief Justice Savage said that he confessed the rule always appeared to be an absurdity; but that it had been so long adhered to that it could be changed only by legislative enactment. In Hall v. Phelps, 2 Johns. 451, which was the case of a promissory note, the court discarded the rule altogether, and Spencer, J., said: "The notion that the persons who attest an instrument are agreed upon to be the only witnesses to prove it is not conformable to the truth of transactions of this kind, and, to speak with all possible delicacy, is an absurdity."

But in Fox v. Reil, 3 Johns. 477, which was an action upon a bond, this departure from the rule was limited to the case of contracts not under seal; and Chief Justice Kent, in delivering the opinion of the court, says that he concurred in the decision of Hall v. Phelps from a sense of the great inconvenience of the English rule when applied to commercial paper, and questions the correctness of the general remarks of Mr. Justice Spencer in that case. He proceeds to show that by the early law of England the witnesses to a deed formed a necessary part of the jury which was to try its validity; that this was dispensed with by the St. 12 Edw. II. c. 2, which allowed the inquest to be taken without any of the witnesses being associated with the jury; but that they were still to be summoned as usual.

"It is agreed," says the statute, "that when a deed, release, acquittance, or other writing is denied in the king's court, wherein the witnesses be named, process shall be awarded to cause such witnesses to appear, as before hath been used." In Shaver v. Ehle, 16 Johns. 201, the case of Hall v. Phelps is spoken of as relaxing the rule only in respect of negotiable paper.

The best reason for the rule is said by Mr. Greenleaf to be that stated by Mr. Justice Le Blanc in Call v. Dunning, 4 East 54, that a fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and that he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction. 1 Greenl. Ev. s. 569. But a reason quite as much relied on seems to have been stated

by Grose, J., in Barnes v. Trompowsky, that "where there is a subscribing witness, the parties thereby agree that the proof of their handwriting shall be made through that medium." And in The King v. Harringworth, Lord Ellenborough says, "Inasmuch as they are the plighted witnesses, the knowledge they have upon the subject is essential, and, if it can be procured, must be forthcoming." 4 M. & S. 354.

The counsel for the plaintiff have argued that the reasons for enforcing the rule have ceased since the passage of the statute which allows parties in a suit to be witnesses. St. 1857, c. 305. But it was held in Call v. Dunning, 4 East 53, that the admission of an obligor, in an answer to a bill of discovery, that he executed the bond, did not dispense with the production of an attesting witness. And in Whyman v. Gath, 20 Eng. Law & Eq. R. 359, and 8 Exch. 803, * * * the court were unanimous in the opinion that it had not. * * * This decision is entirely in harmony with the views expressed by this court in Kelly v. Cunningham, 1 Allen 473; and the ruling of the court below upon this point was erroneous. * * * He cannot ratify a part of the contract made on his behalf, and repudiate the rest. Exceptions sustained.

GOODRICH v. WESTON.

102 Mass. 362. 1869.

Action to recover for work and materials. Notice was given by the defendant to the plaintiff to produce all letters received by them from him, and they accordingly produced several letters, which they testified were all that, after search, they could then find in their possession. The defendant then offered copies of several other letters which he testified that he deposited in the post-office, directed to the plaintiffs, postage prepaid. He also testified that these letters were first copied in his letter-book by a machine press; that his wife afterwards made the copies produced from the copies in the letter-book; that he had compared these copies with the copies in the letter-book, and that they were correct.

After his examination in chief was closed, and while he was being cross-examined on the subject of said copies, his counsel offered to send for the letter-book and produce it in court if

desired by the plaintiffs, to which offer no reply was made; and the letter-book was not introduced or sent for. The plaintiffs objected to the admission of the copies, upon the ground that they were not copies of the originals, and that the letter-book itself would be the best evidence; but the judge overruled the objection. The verdict was for the defendant, and the plaintiffs alleged exceptions.

WELLS, J. The defendant, by giving notice to produce the original letters written by him to the plaintiffs, had entitled himself to prove their contents by secondary evidence. He produced copies, made by his wife from his letter-book; into which the originals had been first copied by a machine press; and testified that he had compared these copies with those in the letter-book, and that they were correct. He also testified that he deposited the originals in the post-office, directed to the plaintiffs. The offer to send for the letter-book, and produce it in court if desired, must be taken at least to relieve the defendant from any suspicion that the letter-book was improperly kept back. The objection to the admissibility of the copies stands, therefore, strictly upon the legal ground stated; namely, "that they were not copies of the originals, and that the letter-book itself would be the best evidence."

Whenever a copy of a record or document is itself made original or primary evidence, the rule is clear and well settled that it must be a copy made direct from or compared with the original. If the first copy be lost, or in the hands of the opposite party, so long as another may be obtained from the same source, no ground can be laid for resorting to evidence of an inferior or secondary character. The admission of a transcript from the record of a deed or other private writing, for the record of which provision is made by law, is not an exception to, but only a modification of, the same rule. But when the source of original evidence is exhausted and resort is properly had to secondary proof, the contents of private writings may be proved like any other fact, by indirect evidence. The admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved and not upon the comparative weight or value of one or another form of proof. The jury will judge that a less satisfactory form of proof is

offered while a more satisfactory one exists and is withheld, or not produced when it might have been readily obtained. But there are no degrees of legal distinction in this class of evidence. Although there has been much diversity of practice, and the decisions are far from uniform, more frequently turning upon special circumstances and facts than upon a general principal, the tendency of authority is, as we think, towards the establishment of the rule here stated. 2 Phil. Ev. (4th Am. Ed.) 568; 1 Greenl. Ev. § § 84,582; Stetson v. Gulliver, 2 Cush. 494; Robertson v. Lynch, 18 Johns. 451; Winn v. Patterson, 9 Pet. 663; Brown v. Woodman, 6 Car. & P. 206; Doe v. Ross, 7 Mees. & W. 102.

In this case the letter-book, if produced, would have been only secondary evidence. We are satisfied that the copies, admitted by the court below, were sufficiently verified to justify their admission as competent evidence of the contents of the original letters.

Exceptions overruled.

KELLOGG v. THOMPSON.

142 Mass. 76. 1886.

Action for the conversion of a promissory note payable to the order of one Wilson signed by one Johnson, by him indorsed to one Murphy and one McCarthy, and pledged to the plaintiff. Verdict for plaintiff. Defendant alleged exceptions. Exceptions overruled.

GARDNER, J. On June 16, 1883, Wilson delivered to the defendant a promissory note, signed by him, for $425, which contained the following: "Collateral in Johnson's note of three thousand dollars, indorsed by Murphy and McCarthy." After this note was put in evidence, the plaintiff was permitted, under the defendant's objection, to show, by the testimony of Wilson, that, in the loan of $400 by the defendant to Wilson, which was represented by the note of $425, nothing was said about the Johnson note; and that Wilson did not know that it was mentioned as collateral in any note he had given the defendant. The court admitted the evidence, and ruled that it "could not be received to affect the right of either party under the note and contract of June 16."

The parties to the suit were not the parties to the note and contract. The rule which excludes parol testimony for the purpose of varying or contradicting a written contract is confined to the parties to the contract, or their privies, and does not prevent strangers thereto from introducing such evidence. 1 Greenl. Ev. s. 279; McMasters v. Ins. Co. of North America, 55 N. Y. 222; Edgerly v. Emerson, 23 N. H. 555; Badger v. Jones, 12 Pick. 371. The plaintiff was not a party to the note and contract between Wilson and the defendant, and was therefore not bound by it. If it speaks falsely, or fails to speak the whole truth, he is not to blame, and can show the truth, even by the testimony of one of the parties who is legally bound by its terms. We think that the evidence was properly admitted.

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Exceptions overruled.

CHAPTER X.

WITNESSES.

FOSTER v. THE PEOPLE.

18 Mich. 266. 1869.

Appeal from a conviction for larceny. New trial granted.

CAMPBELL, J. The respondent was informed against jointly with one William McCoy, in the Circuit Court for the county of Macomb, for the larceny of a horse, and some other articles. Foster was tried separately, and the other defendant, McCoy, was used by the People, as a witness against him.

McCoy proved facts tending to show the guilt of Foster, and showing also his own guilt, in receiving the horse in Detroit, and taking him to Toledo, where the witness was arrested with the stolen property. Upon cross-examination, he admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel, and believed, he had a good defence upon the merits. Counsel for Foster then asked what the defence was. The counsel for the People objected to the question, on the ground that a person accused of crime could not while a trial was pending be compelled to disclose his defence. The court overruled this objection, and then the witness declined to answer. The record does not show on what ground the witness declined. The court refused to direct him to answer.

The question, therefore, narrows itself to an inquiry whether after undertaking voluntarily to explain the transactions connected with the larceny and the disposition of the property involved in the charge on trial, and after answering fully the direct questioning of the prosecution, and unequivocally criminating himself to the extent of complete legal guilt of larceny of that property, he can then refuse to answer further, and be protected against further disclosures relating to the same transaction.

No principle is better settled than that no inference can be permitted against a witness because he asserts this privilege. Carne v. Litchfield, 2 Mich. 340; Rose v. Blakemore, Ryan and

Moody, 382; Ld. Eldon, in Lloyd v. Passingham, 16 Ves. 64; Knowles v. People, 15 Mich. 409. This doctrine is necessary in order to make the privilege of any value. But the necessity of making the privilege effectual renders it equally necessary to take care that where such protection would lead to absurd or unreasonable consequences, it shall not be allowed.

It would certainly lead to most startling results if an accomplice, who has made out a clear showing of a prisoner's guilt, and has, in doing so, criminated himself to an equal degree, could refuse to have his veracity, or fairness, or bias, or corruption, tested by a cross-examination, and yet be allowed to stand before court and jury on the same footing with any other witness who has been perfectly candid, but who may have been convicted of a similar felony. It is perfectly evident that where a witness who has undertaken to give a full account of a transaction, and has not spared himself from conclusive accusation, then turns round and refuses to answer further, his motive must be something more than to save himself from the criminal exposure; and it is of great importance to learn why such a course is adopted. If, in those cases where cross-examination is most desirable, to test the credit of a man who is seeking to save his own liberty, by swearing away that of another, it can be completely prevented at the option of the witness himself, it would be difficult to justify the rule which allows co-defendants to be used by the prosecution at all, when they cannot be received for the defence. I cannot conceive that the law will tolerate such a state of things. When a man has voluntarily admitted his guilt, he has done all that he can to criminate himself; and his protection from further disclosure on the same subject is no protection whatever, because it cannot undo what makes the whole mischief.

The cases which apply to ordinary witnesses—who do not stand properly on the same footing with accomplices—do not in any way sanction such a stretch of privilege. It has been decided, and is the received doctrine, that a witness is entitled to decline answering, not only questions which directly criminate him, but also any questions which may apply to facts forming links in the chain of criminating evidence. And, where he has not actually admitted criminating facts, the witness may unquestionably stop short, at any point, and determine that he

will go no further in that direction. He may judge that his protection does not require him to avoid replying concerning some facts, when as to others the tendency is, or seems to him, more direct and incriminating. Yet even this doctrine, upon the particular facts of the case, although the witness refused to answer the only question which applied directly to the guilt involved, was held in so much doubt in Regina v. Garbett, Denison's Cr. Ca. 236; s. c. 2 Car. & Kir. 474, that the Court of Exchequer Chamber was unable to agree on the first argument, and on the second argument, after some changes in the bench, the three chiefs of the courts, Denman, Wilde, and Pollock, and Patteson, Coleridge, and Erle, JJ., dissented from the other nine, and held the witness had gone too far to claim any further privilege. He had undoubtedly gone very far, but nevertheless he had not convicted himself, and the decision, while right in its principles, was also correct, as it would seem, upon the facts. As no opinions are reported, we cannot ascertain the precise views of the judges, who do not seem to have agreed as to how far the witness had claimed his privilege. But the rule which allows a witness to refuse answering questions not directly pointing to guilt, rests solely on the doctrine that, as in most cases the crimination would be made out by a series of circumstances, any one of them may have such a tendency to aid in reaching the result that an answer concerning it may supply means of conviction by aiding the other proofs which it indicates or supplements on behalf of the prosecution. The right to decline answering as to these minor facts is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted; and must be regarded as waived when the objection to answering to the complete offense is waived. The law does not endeavor to preserve any vain privileges; and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. This distinction between the cases where a witness has or has not furnished sufficient evidence to criminate himself is clearly

recognized in Amherst v. Hollis, 9 N. H. 107, and in Coburn v. Odell, 10 Foster 540, as well as incidentally in numerous other cases, which hold that when he has once made a decisive disclosure, his privilege ceases. And the further consideration is also recognized that a witness has no right, under pretense of a claim of privilege, to prejudice a party by a one-sided or garbled narrative. As Mr. Phillips very neatly expresses it, "A witness may waive his privilege and answer at his peril. From the nature of the right it may be inferred that he will be at liberty to answer or to refuse to answer any questions at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. On the other hand, it is only reasonable that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party." 2 Phil. Ev. (Edward's ed.) 935.

Accordingly, where a witness has voluntarily answered as to material criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate. This view is adopted by the text-writers, and is very well explained in several of the authorities, where the principle is laid down and enforced. 1 Stark. Ev. 206 (9th Am. ed.); Roscoe's Cr. Ev. 174; 1 Greenl. Ev. s. 451; 2 Phill. Ev. 935; 2 Russ. Cr. 931; Coburn v. Odell, 10 Foster 540; State v. K., 4 N. H. 562; State v. Foster, 3 Foster 348; Foster v. Pierce, 11 Cush. 437; Brown v. Brown, 5 Mass. 320; Amherst v. Hollis, 9 N. H. 107; Low v. Mitchell, 18 Maine 372; Chamberlain v. Willson, 12 Vt. 491; People v. Lohman, 2 Barb. S. C. 216; Norfolk v. Gaylord, 28 Conn. 309. In Foster v. Pierce, 11 Cush. 437, it is held that where a witness knows in the beginning that his testimony in the case must expose him to a criminal charge, he must claim his privilege in the outset, or waive it altogether. And, as applied to cases in which that is the gist of the inquiry, this rule appears to be necessary and just to prevent partial and unfair statements. It is probably not designed to apply to any others.

When accomplices are allowed to testify for the purpose of furnishing evidence against a prisoner, they not only know that they are expected to criminate themselves, but they do it with the prospect of an advantage, which, if not absolutely promised,

is substantially pledged to them if they make full disclosures. If they see fit to furnish criminating proof, there is every reason to compel them to submit to the fullest and most searching inquiry. They expressly waive their privilege by giving such proof, for they could not be sworn at all without their consent, while under a joint indictment; and, if not indicted, they could still refuse to furnish evidence of joint misconduct. But there is neither reason nor show of authority which can, in any case, allow to them any privilege whatever, when they have gone so far already, as to any matters in which they and the prisoner on trial have been connected. As to separate and purely private transactions, not connected with the matters under inquiry, they stand like any other witnesses, because they are not, as to those, accomplices at all, and no protection is pledged to them on such charges. 2 Russ. Cr. 927.

Even on the principles applied to ordinary witnesses, they would not be protected, as we have seen, after making any conclusive disclosure. They come upon the stand for no other purpose, and they have never been allowed, under such circumstances, to stop short of a full disclosure. And no privilege is recognized as then belonging to them. Alderman v. People, above cited; 2 Phil. Ev. (Edw. ed.) 930; note; 2 Russ. Cr. 927; Com. v. Price, 10 Gray 472; State v. Condry, 5 Jones L. R. 418; Brown v. Brown, 5 Mass. 320; 2 Phil. Ev. 936.

The witness in the present case ought not to have been permitted to decline answering the question put to him touching the character of his defense, as alluded to in his affidavit for continuance. * * *

There should be a new trial. The other justices concurred.

PART III

TOPICS RELATING TO THE LAW OF EVIDENCE

CHAPTER XI.

JUDICIAL NOTICE.

HANLEY v. DONOGHUE.

116 U. S. 1. 1885.

In error to the court of appeals of the state of Maryland.

GRAY, J. This was an action brought by Michael Hanley and William F. Welch against Charles Donoghue in the circuit court for Baltimore county in the state of Maryland upon a judgment for $2,000 recovered by the plaintiffs on June 4, 1877, in an action of covenant against the defendant, Charles Donoghue, together with one John Donoghue, in the court of common pleas of Washington county in the state of Pennsylvania, and there recorded. The declaration contained three counts. The first count set forth the recovery and record of the judgment as aforesaid in said court of common pleas and alleged that it was still in force and unreversed. The second count contained similar allegations, and also alleged that in the former action Charles Donoghue was summoned, and property of John Donoghue was attached by process of foreign attachment, but he was never summoned, and never appeared, and that the proceedings in that action were duly recorded in that court. The third count repeated the allegations of the second count, and further alleged that "by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is in that state valid and enforceable against Charles Donoghue, and void as against John Donoghue," and that, "by the law of Pennsylvania any appeal from the judgment so rendered to the supreme court of Pennsylvania (which is the

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state to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action. Mason v. Eldred, 6 Wall. 231; Eldred v. Bank, 17 Wall. 545; Hall v. Lanning, 91 U. S. 160, 168; Sawin v. Kenny, 93 U. S. 289.

Much of the argument at the bar was devoted to the discussion of questions which the view that we take of this case renders it unnecessary to consider, such as the proper manner of impeaching or avoiding judgments in the state in which they are rendered, for want of due service of process upon one or all of the defendants; or the effect which a judgment rendered in one state against two joint defendants, one of whom has been duly summoned and the other has not, should be allowed against the former in the courts of another state, without allegation or proof of the effect which such a judgment has against him by the law of the first state. No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts which must, like other facts, be proved before they can be received in a court of justice. Talbot v. Seeman, 1 Cranch 1, 38; Church v. Hubbart, 2 Cranch 187, 236; Strother v. Lucas, 6 Pet. 763, 768; Dainese v. Hale, 91 U. S. 13, 20. It is equally well settled that the several states of the Union are to be considered as in this respect foreign to each other, and that the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws of another state. In Buckner v. Finley, 2 Pet. 586, in which it was held that bills of exchange drawn in one of the states on persons living in another were foreign bills, it was said by Mr. Justice Washington, delivering the unanimous opinion of this court: "For all national purposes embraced by the Federal Constitution the states and the citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects the states are necessarily foreign to and independent of each other; their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions." Pet. 590. Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor im-

peachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. Buckner v. Finley, 2 Pet. 592; McElmoyle v. Cohen, 13 Pet. 312, 324; D'Arcy v. Ketchum, 11 How. 165, 176; Christmas v. Russell, 5 Wall. 290, 305; Thompson v. Whitman, 18 Wall. 457. Congress, in the execution of the power conferred upon it by the Constitution, having prescribed the mode of attestation of records of the courts of one state to entitle them to be proved in the courts of another state, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the state from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed, unless disproved by extrinsic evidence or by the record itself. Knowles v. Gaslight & Coke Co., 19 Wall. 58; Settlemier v. Sullivan, 97 U. S. 444. But Congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the state in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

Upon principle, therefore, and according to the great preponderance of authority (cases omitted), whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact. The opposing decisions in Ohio v. Hinchman, 27 Pa. St. 479, and Paine v. Schenectady Ins. Co., 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort. When exercising an original jurisdiction under the Constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof,

of the laws of each of the United States. But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here. In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. Course v. Stead, 4 Dall. 22, 27, note; Hinde v. Vattier, 5 Pet. 398; Owings v. Hull, 9 Pet. 607, 625; U. S. v. Turner, 11 How. 663, 668; Pennington v. Gibson, 16 How. 65; Covington Drawbridge Co. v. Shepherd, 20 How. 227, 230; Cheever v. Wilson, 9 Wall. 108; Junction R. Co. v. Bank of Ashland, 12 Wall. 226, 230; Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. 857. But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws, or treaties of the United States has been erroneously decided by the state court upon the facts before it, while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error; yet, as in the state court, the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in Green v. Van Buskirk, 7 Wall. 139. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." Talbot v. Seeman, 1 Cranch. 1, 38. Where by the local law of a state, as in Tennessee (Hobbs v. Memphis & C. R. Co., 9 Heisk. 873), its highest court takes judicial notice of the laws of other states, this court, also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the court of appeals has not only affirmed the general rule that foreign laws are facts which, like other facts, must be proved before they can be received in evidence in courts of justice, but has held that the effect which a judgment rendered in another state has by the law

of that state is a matter of fact, n
without allegation and proof; and c
tion of the effect which such a judgm
is admitted by demurrer. Baptiste v.
86, 98; Wernwag v. Pawling, 5 Gill
S. v. Merchants' Bank, 7 Gill 415,
Md. 416, 419.

From these considerations it follow
third count of the declaration that b
the judgment rendered in that state
and John Donoghue was valid and e
who had been served with process in
John, who had not been so served, n
the courts in Maryland and in this co
of those courts, an allegation of fact
Upon the record before us, therefore,
entitled, under the Constitution and
to judgment on this count. It havin
that the other counts are for the s
unnecessary to consider them. The
defendant is erroneous, and the rig
secured by ordering, in the usual form
court of appeals of Maryland be reve
to that court for further proceedings
opinion.

CHAPTER XII.

PRESUMPTIONS.

MOORE v. NEW YORK, ETC., R. R. COMPANY.

173 Mass. 335. 1899.

HOLMES, J. This is an action by a passenger to recover for damage to her luggage, suffered somewhere in the course of a passage from Charleston, Tenn., to Boston. The passage was over six connecting railroads. It does not appear where the damage was done, and the plaintiff seeks to recover upon a presumption that the accident happened upon the last road.

The so-called "presumption" was started and justified as a true presumption of fact that goods shown to have been delivered in good condition remain so until they are shown to be in bad condition, which happens only on their delivery. But it was much fortified by the argument that it was a rule of convenience, if not of necessity, like the rule requiring a party who relies upon a license to show it. 1 Greenl. Ev., § 79; Pub. St. c. 214, § 12. As we, in common with many other American courts, hold the first carrier not answerable for the whole transit, and not subject to an adverse presumption (Farmington Mercantile Co. v. Chicago, B. & Q. R. R., 166 Mass. 154), it is almost necessary to call on the last carrier to explain the loss if the owner of the goods is to have any remedy at all. To do so is not unjust, since whatever means of information there may be are much more at the carrier's command than at that of a private person. These considerations have led most of the American courts that have had to deal with the question to hold that the presumption exists. Smith v. Railroad Co., 43 Barb. 225, 228, 229, affirmed in 41 N. Y. 620; Laughlin v. Railway Co., 28 Wis. 204; Railroad Co. v. Holloway, 9 Baxt. 188, 191; Dixon v. Railroad Co., 74 N. C. 538; Leo v. Railway Co., 30 Minn. 438; Railway Co. v. Culver, 75 Ala. 587, 593; Beard v. Railway Co., 79 Iowa 518; Railway Co. v. Harris, 26 Fla. 148; Faison v. Railway Co., 69 Miss. 569; Forrester v. Railroad Co.,

92 Ga. 699. In the opinion of the cour
and authority is on that side. Mr. Ju
not been able to free our minds from c
fully satisfied that the court has not co
ent doctrine. Still it has not dealt with
v. Boston & Worcester Railroad, 11 All
discussed was a question of contract.
Albany Railroad, 102 Mass. 276, the q
apples. It appeared that the weather l
delivery to defendant. The presump
These are the two nearest cases.

Judg

INDEX

Prepared by F. W. S
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(The figures refer to those at the

Abatement,
plea of, 21, 75, 87, 107, 108, 152, 252.
defined, 107.
for defects in summons not appearing
great particularity required in pleadin
in equity, 252.
use of, 75, 87, 107, 108.
Absconding Debtor,
defined, 437, 438.
attachment of property of, 437, 438. See
service by publication, 457.
Absentees, presumption as to, 410.
Account, Action of, 32, 36, 37.
Account Books,
of parties to the litigation, as evidence, 3
an exception to the hearsay rule, 326-33
correctness of account books verified at
oath, 330.
entries, 328, 329, 332.
how proved, 329, 330.
in early law of England and American
no general American rule, 327, 328.
of facts entered on them, 326.
original books must be produced, 328.
recognized as early as 1609, 327.
regarded as primary evidence, 330.
rule stated, 326.
suppletory oath, 330.
Account Rendered, defined, 36. See also Ac
Actions,
defined, 8.
adequate remedy, defined, 585.
assignment of, allowed when, 70, 71.

Actions—*Continued*
at common law,
causes of, 31-55.
kinds maintainable, 13-15.
suits in equity distinguished from, 56, 57.
to be brought by real party in interest, 69, 70.
at law,
defined, 7, 8.
suits in equity distinguished from, 7, 8.
by writ of entry, 31, 51, 52.
choosing of action, 67.
civil, 4, 5.
classification of, 8, 9.
commencement of, 18, 144, 147, 153.
conduct of, 392, 393.
contracts, 8, 32-38.
defenses to, 25, 36, 105, 137-139. See also Defenses, to cause of action.
equity, 7, 8, 56, 57, 210, 211, 242.
common law actions compared with, 56, 57.
ex delicto, 73.
for,
account, 32. See also Account, Action of.
damages for breach of contract, 31. See also Damages.
damages for injury to person or property, 31. See also Damages.
recovery of a debt, 31, 32. See also Debt, Action of.
recovery of specific property, 31. See also Replevin, Action of.
trespass, 32. See also Trespass.
trover, 32. See also Trover, Action of.
forms of,
codes, effect of, on, 56-68.
special, abolished by codes, 66.
in civil matters, 4, 5.
issues of law and of fact, 27, 28, 211, 212. See also Issues.
joinder of, 76-78. See also Joinder, of actions.
joint, 72.
judgments as bar to, when, 534-540.
local, what plaintiff must prove, 179.
mixed, 8, 51, 52.
non-suit, 181, 182, 428.
of,
assumpsit, 32. See also Assumpsit, Action of.
detinue, 32. See also Detinue, Action of.
replevin, 32. See also Replevin, Action of.
trespass on the case, 15, 32. See also Trespass on the Case.
on covenant, 32. See also Covenant, Action of.
parties to, 4, 5, 69-76. See also Parties.
personal, 8, 31-33.
defined, 8.

Actions, personal—*Continued*
classification of, 31, 32.
forms of, 32.
real, 8, 31.
defined, 8.
kinds of, at common law, 31.
setting a cause for trial, 158.
several, 72, 73.
special, 68.
splitting cause of, effect of, 535, 536.
splitting the grounds of recovery and defe
tort, 8, 9, 32, 72-74. See also Torts.
transitory, 179.
under the codes of procedure, 61-64.
Address, in bill in equity, 231, 232, 236. See
Adjective Law,
defined, 629, 630.
substantive law distinguished from, 629.
Administrative Law,
administration of matters within the exc
623, 624.
administrative officers final judges of fact
Administrator,
attachment of property by, or of property
435.
garnishment of, exemption from, 477, 480.
Admiralty, the jurisdiction of the Supreme Co
591, 592.
Admissions, 323, 324, 419-424.
defined, 324, 419.
confessions distinguished from, 419.
declarations against interest distinguished f
evidence of, 324, 419, 420.
examples of, 324.
final when, 421.
in conspiracy cases, 423, 424.
nature of, 419, 420.
not regarded as hearsay, 420.
of persons not parties to the record, 422, 4
of the parties to the record, 421.
solemn, 420, 421.
unsolemn, 420, 421.
Adverse Possession, evidence of ancient doc
show, 322, 323.
Affidavit,
in application for garnishment proceedings
annexed to summons, 489.

Affidavit, in application for garnishment proceedings—*Continued*
any number of garnishees may be embraced in one, 487.
contents of, 486, 487.
necessity of, 486.
reciting of the amount and character of the indebtedness in the, 487.
swearing to the, 487.
under statutes, 487.
in application for the writ of attachment, 443-446.
alleging grounds of attachment, 445, 446.
amendment to, 465.
amount of indebtedness to be stated, reasons for, 444, 445.
by corporation, or by an officer of the corporation, 443.
contents of, 444, 446.
defective affidavit may be cured by amendment, 446.
filing of, 443.
necessary for jurisdiction, 443, 444.
pleading to, by defendant, 463.
swearing to, 443.
showing cause, necessity of, in, 19.
Agent,
admissions of, binding on principal, when, 422.
has no more power than his principal, 208.
Aliens,
admission of, to United States within exclusive control of Congress, 624.
alien enemy, actions by or against, in equity, 223, 224.
as parties to an action, 148, 223.
attachment of property by, 434.
cannot hold land in some states, 223.
jurisdiction of federal court to issue writ of habeas corpus in respect to, when, 619.
Alimony, 60.
Allegations,
in a declaration, 2, 20, 63-66.
answer to, 20, 21, 82, 139, 140. See also Answer.
by plaintiff in his first pleadings, 65.
certainty,
as to place, 81, 85, 86.
in stating time, quality and names, 81, 86, 87.
of all allegations required, 81, 88, 89.
rules as to, 81.
conclusion not to be alleged, 63.
denial of, 20.
direct and positive, required, 91-93.
evidence need not be alleged, 63, 81.
general, 83.
in action for breach of covenant of warranty, 64.
in action for trover, 66.
in equity, 64.

Allegations, in a declaration—*Continued*
matters alleged must be alleged with ce
matters which need not be alleged, 79, 80
must
embrace all facts to be proved, 99, 10
not be alternative, 90, 92.
not be by way of recital, 90, 92.
not be double, 84, 85.
show title, 81.
of
acts, 64.
demand made on defendant, 62.
facts, 63-66, 80.
quantity and quality, 81.
value, 81.
written instrument under the codes, 8
proof must support, 66.
should
be comprehensive enough to support th
99, 102.
be direct, clear and unambiguous, 90,
not be repugnant to former pleadings
sufficiency of, 21.
to be positive in form, 79.
ultimate facts to be alleged under code
under common law pleading, 62, 64, 93.
under the codes, 62, 64, 86, 94.

Alternative Writ, 583.

Ancient Documents,
defined, 320.
"ancient," different meanings of the term,
as evidence, 320-323.
an exception to the hearsay evidence rule
examples of, 321, 322.
rule stated, 320.
execution of, presumption as to, 321, 364, 4
proper custody of, defined, 322.

Anomalous Plea, to bill in equity, 253, 254.

Answer,
of defendant in equity, 25, 243, 244, 255, 2
defined, 261.
to a bill in equity, 243, 244, 261-269, 27
amendments to, 272, 273, 584.
double office of, 261, 262.
effect of, 267.
exceptions to an, 274, 275.
failure to raise cause of action, 244.

Answer, of defendant in equity, to a bill in equity—*Continued*
furnishing of evidentiary facts sought for discovery, 261.
in case of interrogatories pertinent to charge in the bill, 263, 264.
in federal courts, 243, 244.
in support of a negative plea unnecessary, 255.
in support of the plea, 267-269.
must,
allege facts positively, 264.
be certain, 264.
meet the whole bill, 262, 263.
not contain impertinent matter, 264, 265.
not contain irrelevant facts, 265.
obey the general rules of pleading, 264.
set forth a defense, 264.
state facts, not arguments, 264.
not required, when, 269.
not under oath, effect of, 266, 267.
objectionable answers, 264, 265.
place of the answer, 261.
pleading to the merits, 261.
statement of facts may be answered by formal denial in some jurisdictions, 262.
to his knowledge, information and belief, 263.
to a declaration, 1, 20, 21, 25, 82, 111, 113, 115, 116, 139, 140.
common law rules, 115, 116.
demurrer to, 111, 113.
need not be anticipated in plaintiff's first pleading, 82.
partial, 139, 140.
preparation of, 20.
of garnishee in garnishment proceedings, 491-495.
before justice of the peace, 494.
duty of garnishee to answer, 491.
effect of, 494, 495.
equivocations, effect of, 492.
evasive answer treated as a nullity, 492.
failure to answer, effect of, 491.
filing of answer, 491.
information received from others should be included in, 492.
interrogatories by plaintiff,
garnishee must answer, 491, 492.
must be confined to such matters as under the law necessarily involve the garnishee's liability, 493.
protection from answering impertinent questions, 493.
refusing or neglect to answer, effect of, 496, 497.
entering of conditional judgment, 496.
may be treated as contempt, 496.
scire facias, issuance of writ of, 496, 497.
when a corporation, 493.

Appeal, 28, 195, 196, 198-205.
affirmance of judgment on
assignment of error on, 2(
briefs on, 203, 204. See a
effect of, on judgment, 19
execution on judgment b
when, 200.
from judgment on demurr
in civil common law acti
must be taken, when, 199.
necessary that case be tak
review the cause,
oral argument on, 204, 20
parties to, 198, 199.
prayer for, 195, 196, 199.
preparation and filing of
review of judgment on, 1
right of,
may be waived, 198.
unlimited, 195.
statutes to be followed in
time for, fixed by statute
Appearance, entering of, to
Apprentice,
detention of, by other
master for, 639, 6
minor may be apprenticed
Arbitration and Award, w
arbitration, 602,
Assault and Battery, actio
Assessors, powers of, 507.
Assignee, attachment of pr
Assignment, of action allow
Assumpsit, Action of, 33-3(
action,
of account supplement
of debt supplemental
classes of, 33.
for benefits received, 35.
for damages for breach
general assumpsit, 34-36.
general rules of, 34-36.
lies, when, 34-36.
special assumpsit, 33, 34
based upon an express
lies, when, 33.
"waiving the tort and

Attachment, 431-473.
defined, 431.
against the person, 432. See also Capias, Writ of.
garnishment,
distinguished from, 475.
in aid of attachment, 475, 476.
of property, 432-473.
affidavit, 443-446, 465. See also Affidavit.
allowed in what classes of actions, 433, 434.
amendments to writ, 451, 452, 464-468.
application for writ, 443-446.
at common law unknown, 432.
"attachment in aid," 443.
bonds, 446-449, 454-456. See also Bonds.
called an extraordinary proceeding, 436.
defendant,
defense of, effect of, 462, 463.
interpleading by third party, effect of, 463, 464.
non-appearance of,
effect of, 461, 462.
delay in execution of writ, effect of, on liability of officer, 450.
dissolution of,
as to others than the defendant, 470, 471.
defects in plaintiff's proceedings, 468, 469.
effect of, 471, 472.
grounds for, 468-472.
insufficiency of bond, 468.
property exempt from execution, 468.
substantial defects appearing on the face of writ, 469.
upon death of the defendant, when, 469.
when debtor's property is in the hands of bankruptcy court, 469.
duty of officer receiving writ, 450, 451.
appraisement of the property, 451.
possession of property, to secure, 470.
return of writ, 451, 452.
under it officer may levy on defendant's real or personal property, 450.
enforcement of, 432.
excessive levies, how guarded against, 451.
for,
fraud in contracting the debt, 440-442.
fraudulent disposition of property by debtor, 438-440.
transfer of real property in fraud of creditors, 438, 439.
in England and the United States, 432.
in hands of administrator, executor, or guardian, 435.
issuance of writ, 450, 451.
nature of, 449, 450.

Attachment, of property—C
not allowed against,
municipal corporatio
notice of intention to fi
of,
absconding debtors, 4
corporations, 435.
foreign corporations,
married woman, 435.
non-resident debtors,
partner, 434.
persons,
jointly liable, 434.
who stand in the r
on account of intend
state, 440.
"original attachment,"
parties,
against whom remedy
who may bring remed
pleadings in, 461.
possession of court offic
preservation of attache
quashing the writ, 451,
removal of property wh
453.
return of writ, 451, 452,
amendments to, 467.
indorsement setting f
sale of attached proper
after judgment, 472.
duty of officer as to s
object and procedure,
service of writ upon def
actual service, 457.
at domicile of defend
by publication, 457-4
constructive service,
personal service, 18, 4
the writ, 449, 466, 467.
amendment of, 466,
origin of, 432.
Attorney,
client and,
privileged communicati
all facts communicat
attorney must be acti
collateral facts not p

Attorney, client and, privileged communications between—*Continued*
example, 390.
how claimed, 390, 391.
made in furtherance of a criminal or illegal design not privileged, 389.
privilege,
belongs to the client, 390.
not terminated by death of attorney, 390.
waiver of, 390, 391.
when third party is present not privileged, 390.
Averments, in a declaration. See Allegations.

Bail,
defined, 641.
bond as a condition for, 641.
denial to an accused of, issuance of writ of habeas corpus on account of, 644.
excessive, writ of habeas corpus on account of, 644.
principal, 641.
surrender of, by special bail, 641.
special bail,
right of, 641.
writ of habeas corpus will not lie against, when, 641.
Bankruptcy, exemptions in, 39.
Bastard, father of, may be lawfully imprisoned, in order to compel him to support child, 635.
Bibliography,
law of attachment and garnishment, 498.
law of equity pleading, 277.
law of evidence, 429.
law of extraordinary remedies, 627.
law of habeas corpus, 652, 653.
law of judgments and executions, 565, 566.
pleadings in civil actions—at common law and under modern statutes, 146.
practice in civil actions, 205.
Bill in Equity, 211, 230-243, 248-256, 259-261, 267-269, 272.
defined, 211, 230.
address in, 231, 232, 236.
form of, 236.
alternatives in, when permitted, 243.
amendments to, 271, 272, 274.
anticipates the defense, 253.
bill with double aspect, when permitted, 243.
caption of, 232.
charging part of the, 232, 234, 235.
claim of plaintiff must consist of cause of action, 230, 231.
confederating part of the, 232, 237.

Bill in Equity—*Continued*
defects in,
amendments for, 271, 272.
overlooked in equity, 271.
demurrer to, 245-248. See also Demurrer,
filing of, 230.
charities, 238.
on behalf of infants, 238.
formal parts of the, 231-233.
information distinguished from, 230.
interrogatory part in the, 232, 235, 236.
introduction in, 232, 237.
contains names of plaintiff and defenda
object of, 237.
jurisdictional clause in the, 232, 237, 238.
multifariousness forbidden in, 242, 243.
names,
of defendant in, 232, 237, 240.
of plaintiff in, 232, 237.
pleas to, 244, 248-256, 259-261, 267-269, 272.
to a bill in equity.
practice parts of the, 233, 240-242.
prayer,
for process, 232, 239, 240.
for relief, 232, 238, 239.
replication to, 243, 244, 272. See also Rep
signature to the, 233, 240, 241.
of counsel, 240.
of plaintiff, 240, 241.
stating part or premises in, 233, 234.
supplementary pleadings to, 273, 274.
ultimate facts, statement of, 232.
under federal practice, 232.
verification of the, 233, 241, 242.
defined, 241.
not a matter of form, 241.
Bill of Discovery, 231. See also Discovery.
demurrer to a, grounds for, 247.
statement of grounds for, 231.
Bills and Notes,
actions on, 69, 76, 87, 172.
admissions of prior holder of negotiabl
purchaser for value, 422.
evidence, admissibility of, to show def
note, 326.
garnishment of holder of promissory not
Bills of Exceptions, 171, 196, 199, 201, 202.
contents of, 201.

Bills of Exceptions—*Continued*
filing of, time for, 196, 199, 202.
prepared usually by court reporter, 201.
transcript of proceedings during trial, necessary to, 171, 201.
Bills of Exchange, notice of dishonor of, 368.
Birth,
declarations of, as evidence, 312, 313.
entry in books of midwife as evidence of, 325, 326.
Bonds,
in attachment proceedings, 446-449, 454-456, 466.
amendment of, 466.
"bail bond" explained, 455, 456.
before obtaining attachment, 446-449.
approving of, 447.
execution of, 448.
form of, 446, 447.
insufficient bond may be increased, 449.
required in most states, 446.
runs to the state under some statutes, 447.
sufficiency of, 446.
surety on, 448, 449.
terms of, 446.
the obligee, 447, 448.
where attachment is sued out against all of several defendants, 447.
by defendant in order to retain possession of attached property, 454, 455.
discharged, when, 455.
objects of, 455.
permitted in some states, 454.
dissolution bond, 455, 456.
effect of, 455.
object of, 455, 456.
"forthcoming bond" explained, 454, 455.
purpose of, 466.
in garnishment proceedings, 488.
statutory requirements, 488.
where proceedings are begun,
after recovery of judgment, 488.
before recovery of judgment, 488.
Breach of Promise to Marry, action for, 137, 637.
Briefs,
defined, 203.
on appeal, 203, 204.
Burden of Proof,
defined, 415.
examples of, 414, 415, 418.
goes forward with the evidence, 414, 415.
on defendant, when, 415, 416.

Burden of Proof—*Continued*
on plaintiff, when, 415, 41
operation of the, 415, 417
presumption, effect of a,
shifting of the, 416, 417.
which party has the, must
sometimes from pleadir
sometimes from substar
Business,
account books of a, as e
entries and declarations
evidence,
an exception to hearsa
are primary evidence,
entrant must be dead
entries must be made i
how proved, 333, 334.
rule stated, 331, 332.

Calendar of Cases, prepara
Canon Law, of England in
Capias Ad Respondendum,
Capias Ad Satisfaciendum,
Capias, Writ of, 431, 555,
defined, 431.
as an execution, 555, 55
as a process, 555.
Caption, in bill in equity
Case, Action of Trespass
Case.
Certainty,
in pleadings,
as to place, 81, 85, 86.
in stating time, quali
of all allegations requ
rules as to, 81.
in the statement of fac
each ultimate fact m
illustration, 214.
uncertainty may aris
Certiorari, Writ of, 568,
defined, 568.
a prerogative writ, 579
bars to, 584-588.
costs in, 591.
demand and refusal in,
denied against,
an award of arbitrat

Certiorari, denied against—*Continued*
medical association for expelling a member, 603.
municipal corporation, 602.
discretion of the court in issuing, 589, 590.
errors are corrected by, 573, 604, 605.
what errors it corrects, 604, 605.
example of, 568.
granted in law, not in equity, 569.
in criminal cases under the early common law, 572.
issued,
by tribunal established by law, 604.
in lower federal courts in aid of jurisdiction, 592.
in state courts in aid of appellate jurisdiction, 592, 593.
not issued to a common law court, 602, 603.
to an inferior court, 602.
to county court, 603.
to courts martial, 602.
to probate courts, where, 602.
issue tried in same manner as ordinary actions, 590.
origin of, 572, 573.
petitioner in,
who may be, 579, 580.
petition for,
lies only after a final adjudication, 577.
motion of leave to file, 577.
questions involved in, 604, 605.
under modern statutes in England and the United States, 572, 573.

Challenging of Jury, 167-169. See also Jurors, challenging of.

Chancellor,
court of, 11.
discretion of, 57, 60.
early chancellors were often ecclesiastics, 210.
office and duty of, 11, 56.
power to issue writs and grant equitable relief, 11-13, 56.

Change of Venue, 155, 156.
defined, 155, 156.
allowed on what grounds, 155.
application for, 156.
because of prejudice of the judge, 156.
granting of, within the discretion of the court in many jurisdictions, 156.
not granted for purposes of delay, 156.
right to, 156.
venue, defined, 155.

Character Evidence,
admissible, when, 298-300.
how presented, 300.

Character Evidence—*Continued*
inadmissible, when, rule stated, 297.
matters not within the rule, 301.
necessary to prove an ultimate fact, 301.
reputation, how proved, 300, 301.
Charging Part, of the bill in equity, 232, 234, 235. See also Bill in Equity.
Charging the Jury, 186-189. See also Instructions to Jury.
Chinese Exclusion Cases, 619, 620, 624.
Choses in Action, assignment of, 70.
Citizens,
coercion may be used to compel performance of duties owed to the state, 635.
duties enumerated, 635.
Clean Hands, equitable doctrine of, applied at law, when, 569.
Clerks of Court, funds held by, not subject to garnishment, 480.
Client, relation of attorney and. See Attorney, client and.
Clubs, as parties to an action, 148, 149.
Code Pleading,
defined, 8.
"actions," "suits," use of the words in, 8.
allegations, 62. See also Allegations.
answer in, 25. See also Answer.
codes, purpose of the, 62, 63.
considered as an improvement on common law pleading, 63.
copies of written instruments to be recited or filed with pleadings, 93.
defects of pleading as to parties, 75.
facts,
statement of, 62.
ultimate, to be alleged, 63, 64.
form and substance of pleadings required in, 12, 19, 59, 79, 93.
motion to make pleading more specific, 114, 115.
New York Code of Procedure adopted in many states, 61.
rules governing, 29.
signing of pleadings, 101.
stating cause of action, 79.
statutes declaring special rules of pleading, 67, 68.
verification of pleadings under oath, 100, 101.
Commitment, writ of habeas corpus for error in papers of, 623.
Common Law Pleading, 5. See also Pleading, under common law rules.
Complaint. See also Declarations.
defined, 17.
Conclusion of Law,
defined, 219.
not to be stated in equity pleadings, 219, 220.
Confederating Part, of the bill in equity, 232, 237. See also Bill in Equity.

Confession and Avoidance,
plea of, to plaintiff's pleading, 25, 26, 115, 129-132.
defined, 129.
discharge, 130.
excuse, 129.
giving color, 131, 132.
justification, 129.
"necessary and proper defense of his person," 130.
under state statutes, 26.
Confessions,
defined, 302, 419.
admissible as evidence, when, 302-304.
admissions distinguished from, 419.
facts, evidence of, learned through inadmissible confessions, when presented without aid of confession, admissible, 304.
how presented, when admitted as evidence, 304.
inadmissible as evidence, when, 302, 303.
matters not within rule, 304.
rule stated, 302.
no presumption of law that, are false, 302.
obtained by threat, inducement or promise made by one in charge of the prosecution, rejected as evidence, 302, 303.
voluntary,
admitted as evidence, 302.
typical cases, 303, 304.
Congress,
administrative matters within the exclusive control of, not cognizable by the courts, 623, 624.
suspension of writ of habeas corpus by, 625, 626.
Conservator, attachment of property by, 434.
Conspiracy,
admissions in cases of, 423, 424.
admissible against co-conspirators, 423.
rule, 423, 424.
Constitutional Guaranties,
persons,
are entitled to a speedy trial under, 643.
cannot be tried twice for the same offense under, 647.
imprisoned in violation of, writ of habeas corpus for, 643, 644.
Continuances, 144, 145.
Contract,
action,
of account on, 37, 38. See also Account, Action of.
of assumpsit on, 33-36. See also Assumpsit, Action of.
of covenant on, 36. See also Covenant, Action of.
of debt on, 36, 37. See also Debt, Action of.
assignment of,
parties to an action upon the, 70, 71.

Contract, assignment of—*Continued*
performance of, 71.
evidence of third party to show bargai
implied by law, 33.
not under seal, 33.
parol defined, 32.
parol evidence in,
admissible, 371-373.
inadmissible, 372, 373.
parol evidence rule in, 371-373.
rights of party to a, 629.
specialty, defined, 33.
under seal, 33.
Contributory Negligence, an example of j
Conversion, mere detention of goods not,
Corporations,
as parties to an action, 148, 152.
attachment of property by, or of prope
equitable relief against officers of, for
of office, 614.
garnishment of, 476.
mandamus against, 594, 595.
quo warranto proceedings against, 581
to test title of officers, 611, 612.
service of process on, 519.
Costs,
in actions for writs of certiorari, hab
tion, quo warranto, 591.
in actions tried by jury, 159, 160.
Counterclaim. See Set-Off and Counterc
County Board of Supervisors, power of,
nesses and punish for contem
Court Baron, 10.
Court of Chancery, England, 11-13.
Court of Common Pleas, England, 10, 11.
Court of Exchequer, England, 10, 11.
Court of King's Bench, England, 10, 11,
Court of Piepoudre, 10.
Court Reporter, 171.
Courts,
defined, 207, 504.
adjournment of, 509.
sine die, 509.
vacation distinguished from, 509.
cannot be held on Sunday or certain
constituted how, 4.
created by law, 504.
history of, 10-13.

Courts—*Continued*
judgment of, 499-553. See Judgments.
jurisdiction of, 208, 511, 512. See also Jurisdiction, of courts.
nature and essentials of, 207, 504-507.
of common law, 208.
of equity, 57, 58, 207, 208-210.
officers of,
de facto officer, judgment of, effect of, 508.
necessity for, 508.
qualifications of, 509.
organization of, 507, 508.
power of,
to try cases and give judgment, 507, 511, 514.
depends on law defining powers and not on facts, 512-514.
jurisdiction, 511, 512. See also Jurisdiction, of courts.
recess of, 509.
records,
are required to be kept by, 550.
as evidence of the facts of the controversy, 550.
record of a judgment as prima facie evidence against strangers to an action, 550.
sitting of,
place of, 510, 511.
terms of, 508, 509.
how reckoned, 509.
time of, 508-510.
unconstitutionality of act creating court, whether grounds for attacking judgment collaterally, 506, 507.
vacation of, 509.
Courts, Great Britain,
description of the ancient English courts, 10, 11.
history of, 10-13.
Courts, United States,
bill of equity in the, 232, 235-237, 239-241, 244, 270, 275.
description of the, 13.
replication to bill in equity in the, 243, 244.
Covenant, Action of, 32, 36.
lies, when, 36.
promise by defendant under defendant's seal necessary to support an, 36.
Creditor, attachment of property by, 433, 434. See also Attachment.
Crime,
person convicted of, incompetent as a witness, 381, 382.
right of state, to try and punish a person for, 634, 635.
constitutional guaranties respecting, 634, 635.
writ of habeas corpus will lie for breach of, 635.
Criminal Evidence,
accused,

Criminal Evidence, accused—*Continued*
need not be a witness against himse
prosecutor cannot call, to testify, 3
in homicide case,
examples of, 284, 286, 287, 344, 345.
presumption as to evidence in crimes,
privilege of an accused against self-in
assertion of the privilege by the ac
waiver of privilege by accused, effe
Crops, trover, action of, for, when, 43,
Cross-Bill,
defined, 269.
filing of, to a bill in equity, 269, 270.
in federal courts, 270.
Cross-Claims. See Set-Off and Counterc
Cross-Examination,
defined, 393.
of witnesses, 181, 393, 399-403.
impeachment by, 400-403.
leading questions not objectionable
must be directed only to matters
tion, 399.
no limit to, but discretion of the co
refusal of court to permit, within
right of party to, 399.
scope of, 399.
to show,
favor or bias, 401, 402.
immaterial facts degrading the w
inconsistent, prior statements, 40
whether witness had been convic
upon death of witness before an c
will be struck out, 399.
Curia Pedis Pulverizati, 10.
Custody, defined and explained, 615.

Damages, action for, on contract and t
Debt, Action of, 32, 36, 37, 83.
lies, when, 36, 37.
pleading performance in, 83.
plea of non damnificatus in, 83.
sum due must be definite and certain
Debtor,
absconding, attachment against prop
sconding Debtor.
attachment of property of, 432, 473.
co-debtor, garnishment of, 484, 485.

Debtor—*Continued*
creditor or stranger cannot interfere in bona fide litigation of the, 551.
garnishment of, as debtor of the defendant, 478, 481-485.
joint garnishment of, 485.
non-resident, attachment of property of, 436, 437. See also Non-Resident.
Declarations,
against interest, 323-326.
admissions distinguished from, 323, 324.
evidence of, 323-326.
must have a plain tendency to charge the declarant or maker, 324.
rule stated, 323.
statements incorporated with declarations against interest, 325, 326.
in pleading, 6, 7, 17, 20-23, 26, 50, 57, 63-66, 74, 77-79, 82, 95, 96, 101-104, 109-116, 118-129, 139, 140.
defined, 17.
allegations, 20, 63-66. See also Allegations.
amending of, 6, 7.
amount of damages to be stipulated in, 95.
"and therefore brings this suit," explained, 95.
answer to, 20, 21, 82, 111, 113, 115, 116, 139, 140. See also Answer, to a declaration.
complaint synonymous with, 17.
conclusion of, should lay damages, 96.
demand for relief sought by plaintiff should be stated in, 95, 96.
demurrer to, 21-23, 74, 109-114, 117. See also Demurrer; Special Demurrer.
denial, 20, 115, 118-129. See also Denial.
filing of, 17, 50, 101, 104.
first pleading called the, 17.
plaintiff's statement synonymous with, 17.
preparation of, 17.
stating cause of action in, 77-79.
in questions of pedigree,
defined, 312, 313.
as evidence, 312-314.
admissible, when, 312-314.
all conditions of the rule must be satisfied, 313.
an exception to the hearsay evidence rule, 312-314.
declarant must be related by blood or marriage, 312.
of birth, death, legitimacy, or marriage, 312, 313.
rule states, 312.
of declarant of his physical or mental condition or of his intention, as evidence, 335-342.
an exception to the hearsay evidence rule, 335-342.
groans, grunts, and sighs as evidence of pain, 336.

Decree. See also Judgments.
defined, 499, 500.
final,
appeal may be taken to a higher court from, 276, 277.
in equity, 276, 277.
interlocutory,
defined, 276.
may be altered, 277.
Deeds,
as evidence, 315.
petitions in equity to correct, 57.
Default, 154-155.
defined, 154.
in actions ex contractu, 155.
in actions sounding in tort, 155.
motion to set aside, 155.
vacation of, 154, 155.
Defendant,
defined, 5.
association, club, or society as, 149.
examination of, by plaintiff, 180.
misjoinder or nonjoinder of, effect of, 150.
notice to, of cause of action, 103, 104.
pleadings of the, in equity, 244-270. See also Answer; Demurrer; Pleas.
preliminary investigation by attorney for, 105, 106.
usually prefers to defend action within his own county or township, 107.
who should be, 149.
right of, in garnishment proceedings, 495, 496.
Defenses,
to cause of action, 25, 26, 137-139.
arising after commencement of action, 139.
disclaimer of any interest in property, effect of, 138.
equitable, 138.
generally, 138, 139.
must always be pleaded, 137, 138.
partial defense, 139.
personal, 137.
under modern statutes, 138, 139.
to garnishment proceedings, 494, 495.
Demand and Refusal, in certiorari, mandamus, and prohibition, 578, 579.
Demurrer, 22, 23, 25, 26, 74, 109-114, 118, 239, 245, 246. See also Special Demurrer.
defined, 109, 110, 239, 245.
abuse of, 118.
available only where some defect appears on face of pleading, 111.
classes of, 111.

Demurrer—*Continued*
general, 111, 246.
kinds of, 246, 247.
may be filed to any pleading, 113.
motion to direct verdict operates as
ore tenus, 246, 247.
special, 110, 111, 246.
defined, 111.
abolished by modern statutes, 110.
to a bill in equity, 239, 245-248.
defined, 245.
"abide by" explained, 246, 248.
abolished in the federal courts, 244.
admits the existence of the facts p
amendment to, allowed when, 272.
attacks the bill for defects apparent
because,
bill does not state a case, 247.
bill is defective in its frame, 24
bill shows on its face no jurisdicti
of the Statute of Frauds, 247.
of the Statute of Limitations, 24
remedy will not lie, 247.
defense made, 245, 246.
effect of, on the facts, 248.
for nonjoinder or misjoinder of pa
"for want of equity" explained, 24
general demurrer, 246.
grounds for, 247.
kinds of, 246, 247.
ore tenus, 246, 247.
overruled, effect of, 246.
special demurrer, raised how, 245, 2
"stand on" explained, 246.
to plea, 259, 260.
to a bill of discovery, 247.
to a declaration, 21-23, 74, 109-114, 117
filing of, 22.
forms of, 110-112.
indefinite pleading, challenging for
insufficiency of pleading, challengin
judgment on, 110.
nature and effect of, 109, 110.
pleading over, 110, 114.
pleading to the merits by, 117.
reaches only those legal aspects
pleading, 23.
ruling of the court upon, 113, 114.

Demurrer, to a declaration—*Continued*
under modern practice, 110.
under the early common law, 110.
to a plea or answer, 26, 111, 113, 114.
form of, 111.
questions every pleading in the series theretofore filed, 113.
ruling of the court on, effect of, 114.
to a replication, 111, 113, 114.
form of, 111.
questions every pleading in the series theretofore filed, 113.
ruling of the court on, effect of, 114.
Denial,
to a declaration, 20, 25, 26, 115, 118-129, 132, 133, 136.
defined, 119, 120.
estoppel, when, 128.
general denial,
"and of this he puts himself on the country," 126, 132, 136.
limitations on the use of, 122.
plea of, 120-122.
special traverse distinguished from, 126.
in form affirmative, 136.
plea of,
by way of traverse, 115.
nil debet, 119, 123. See also Nil Debet, Plea of,
non assumpsit, 122, 123. See also Non Assumpsit, Plea of.
non cepit, 119, 123. See also Non Cepit, Plea of.
non detinet, 124. See also Non Detinet, Plea of.
non est factum, 119, 123, 124. See also Non Est Factum, Plea of.
not guilty, 119, 124, 125. See also Not Guilty, Plea of.
nul tiel record, 124. See also Nul Tiel Record, Plea of.
under the codes, 128, 129.
requisite of a good traverse, 127, 128.
special denial, 118, 120, 121, 126, 127, 132, 136.
"and this the defendant is ready to verify," 126, 127, 132, 136.
full of technicalities, 127.
plea of, 120.
use of, 120, 121.
tender of issues, 132, 133.
Depositions, 175-178.
commissioner, power and duty of, 177.
issuing of a commission to take, 176.
may be taken in all forms of civil actions, 175.
methods of taking, 175, 176.
motion to suppress, effect of, 178.
notice to other party to be given, 177.
of persons residing out of jurisdiction of court, 175.
of persons unable to attend court by reason of their physical disability, 175.

Depositions—*Continued*
opening of, 177.
oral interrogatories, 176-178.
purpose of, 175.
statute to be strictly followed in taki
witness must sign and swear to deposi
written interrogatories, 175, 176.
Detinue, Action of, 32, 38, 47, 48.
Dilatory Pleas, 21, 22, 106-109, 115-118.
choice of, by defendant, 106, 107.
classes of, 21.
decision on, does not decide the merits
great particularity required in pleadin
must,
be pleaded at beginning of suit, 11
not embrace matters of defense, 10
not favored by the courts, 21, 22, 108.
overruled, effect of, 109.
pleading must tend toward an issue o
pleading over, 109.
pleas,
in abatement of the action, 21. Se
in suspension of the action, 21.
to the jurisdiction of the court, 21.
presentation of, 116, 117.
sustained, effect of, 109.
waiver of, by defendant, 115, 116.
Direct Examination, of witnesses, 393
examinations of.
Discovery, 220, 221, 231.
defined, 221.
alien enemy may file a bill for, 224.
as a cause of action, 221.
bill of, 221, 222, 231.
of deeds and documents, 220.
of evidentiary facts in support of ulti
statement of evidentiary facts necess
when incidental to cause of action, 2
Divorce,
action for, 18, 60.
decree of, granted when it should no
jurisdiction of courts in, 512, 513.
Documents, 318-323, 359-378.
ancient, 320, 323. See also Ancient
as evidence,
ancient documents, 320-323.
best evidence rule, 364-366.
excuses for non-production, 367-369

Documents, as evidence, excuses for non-production—*Continued*
public documents, 369.
voluminous and bulky writings, 369.
writing lost or destroyed, 367.
writing outside the jurisdiction, 367.
writing under control of an adversary, 368, 369.
may be real evidence, 359.
parol evidence,
admissible,
to explain an alteration in the instrument, 373.
to explain technical language, words, or signs in instrument, 375, 376.
to interpret equivocations, 378.
to show,
contract to be ineffectual, 371.
failure or lack of consideration in a contract, 371.
how expressions of an instrument are affected by extrinsic circumstances, 375.
real purpose of a contract, 373.
substitution of new agreement, 372.
that writing once existed, 371.
the meaning of expressions in an instrument, 375.
whole bargain, 372.
inadmissible,
of declarations of maker of a solemn instrument, 377.
reasons for rule, 377.
to explain a written instrument which is without meaning, 376, 377.
to show,
a collateral agreement, 372.
a custom, 372, 373.
parol evidence rule, 370-375. See also Parol Evidence Rule.
rule of evidence relating to writings, 377, 378.
secondary evidence of contents of writings, 369, 370.
attested writings, 359-364.
defined, 359.
execution of, shown by testimony of one subscribing witness, 360-362.
proof of, unnecessary, when, 363, 364.
authorship of, proof of, 359.
construction of writings,
declarations of maker in, inadmissible if proof is by parol, 377, 378.
parol evidence,
admissible, when, 375, 376.
inadmissible, when, 375.
rules stated, 375, 376.
technical language, explained and interpreted, how, 375, 376.
words and signs explained by parol evidence, when, 376.

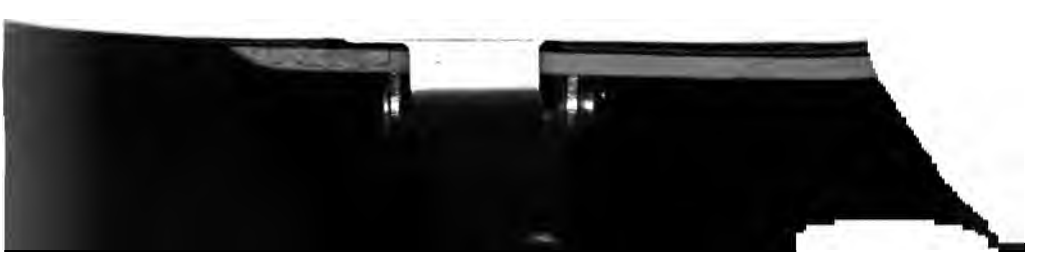
Documents, construction of writings—*Co*
written instrument without any mea
parol evidence to give it meaning i
contents, proof of, 364-366.
"best evidence rule," 364-366.
applied to duplicate original writi
meaning of, under early law and
scope of rule, 365, 366.
discovery and production of, 220, 221,
documentary evidence, defined, 283.
this heading.
document, defined, 359.
notice to produce, explained and effec
public, 318-320, 369. See also Records.
unattested writings, 359-364.
execution of, how shown, 360-362.
proof of, unnecessary, when, 363, 364.
writings,
duplicate original, as evidence, 366.
execution of, how shown, 360-364.
proof of, necessary, when, 363, 364.
inscriptions on address tags or ban
dence rule," 365.
secondary evidence of contents of,
Double Jeopardy, constitutional right of
Due Process of Law, notice to defendan
Dying Declarations, 310-312.
defined, 310.
evidence of,
admissible even if person lives, whe
an exception to the rule in regard t
declarant must have been about to d
declaration,
expressing an opinion,
admissible in criminal cases, wh
inadmissible in civil cases, 311,
must account for the dying condi
oral or written statements include

Easement, in use for twenty years, presu
Ejectment, Action of, 52, 53, 67.
essentials of, 52, 53.
origin of, 52.
under modern statutes, 53.
Entries,
against interest, evidence of,
must have a plain tendency to char
rule stated, 323.

Entries—*Continued*
in account books of parties to the litigation, as evidence,
an exception to the hearsay evidence rule, 326-331.
form of, immaterial, 328.
must be of transactions usually charged on account books, 328.
of cash transactions, how proved, 329.
of third persons made in regular course of business, as evidence,
an exception to the hearsay evidence rule, 331-335.
are primary evidence, 334.
entrant must be dead or otherwise unavailable as witness, 331, 333.
how proved, 333, 334.
must be made in regular course of the business, 333, 334.
rule stated, 331, 332.
Equity. See also Chancellor; Injunctions; Specific Performance.
defined, 56.
actions, 7, 8, 56, 57, 210, 211, 242.
adoption of the civil law by, 57.
as administered by English Courts, 56.
bill in, 211, 230-243. See also Bill in Equity.
common law actions distinguished from suit in, 56, 57.
co-ordinate with the common law, 56.
courts of, 57, 58.
extraordinary relief granted by, 58.
"for want of equity" explained, 246.
"He who would seek equity, must do equity," 58.
jurisdiction of, 208, 209.
multiplicity of suits avoided in, 226, 242, 258.
power of chancellor to grant equitable relief in early English law, 11-13.
procedure, 57. See also Equity Pleading; Equity Practice.
relief in, 12-57.
against officers of a corporation for breach of trust and misconduct in office, 614.
distinguished from relief at law, 59.
remedy in,
not a bar to certiorari, habeas corpus, prohibition, or quo warranto, 588, 589.
Equity Pleading, 5, 12, 13, 25, 30, 59, 100, 207-277.
defined, 209.
answer in, 25.
bill in equity, 211, 230-243. See also Bill in Equity.
character of pleading determined by the statement it contains, 222.
construction of pleadings, 222.
distinct from common law and code pleading, 209.
facts, statement of, in, 212-220. See also Facts, in an equity action.
in Court of Chancery, England, 12.
in courts of the United States, 12, 13.
in England, 5.

Estoppel, by judgment—*Continued*
no estoppel,
by judgment in rem against anyone not a party to proceeding, 552.
if the court that tried the first could not try the last one, 547.
if two actions depend on different law, 546, 547.
only as to points certainly and necessarily decided, 545, 546.
parties estopped, 542, 543.
must be parties to original action, 542, 543.
the Duchess of Kingston case, 543.
Evidence, 279-429.
defined, 281, 285, 286, 347.
account books of parties to the litigation as, 326-331. See also Account Books.
admissions as, 323, 324, 419-424. See also Admissions.
analyzed, 279-281.
ancient documents as, 320-323. See also Ancient Documents.
"best evidence rule," 364-366. See also Documents, as evidence.
burden of proof of, 414-418. See also Burden of Proof.
cash transactions as, when, 329.
character of parties as, 298-300. See also Character Evidence.
conception of, 279.
confessions as, 302-304. See also Confessions.
declarations,
against interest as, 323-326. See also Declarations.
in questions of pedigree as, 312-314. See also Pedigree.
of birth as, 312, 313. See also Declarations.
of declarant of his physical or mental condition or of his intention as, 355-342. See also Declarations.
of matters of public or general interest as, 314-318.
of third parties made in regular course of business as, 331-335. See also Declarations.
which are a part of some fact or transaction that is itself admissible as evidence as, 343-346. See also Declarations.
deeds as, 315.
documentary, 318-323. See also Documents.
documents as, 318-323, 359-378. See also Documents.
dying declarations as, 310-312. See also Dying Declarations.
entries,
in account books of parties to the litigation as, 326-331. See also Entries.
of third parties made in the regular course of business as, 331-335. See also Entries.
examination of witnesses, 180, 181, 392-404. See also Witnesses, examinations of.
exceptions to, preservation of, 160, 161.
exclusion of, rules of, 279-355.
expert testimony, 353-355. See also Expert Testimony.

Evidence—*Continued*
extra-judicial,
defined, 282.
judicial evidence distinguished from, 282, 283.
former testimony at trial as, 308, 310. See also Testimony, former.
forms in which, may be presented, 356-404.
hearsay, 305-346. See also Hearsay Evidence.
exceptions to the rule, 308-346.
inadmissibility of,
by a rule of some branch of the substantive law, 288.
of,
admissions, 324. See also Admissions.
character of parties, 297-301. See also Character Evidence.
confessions, when, 302, 303. See also Confessions.
irrelevant facts, when, 284, 285.
matters,
likely to mislead the jury, 291-294.
which are slight, remote or of conjectural significance, 291-294.
which will complicate the case unnecessarily, 291-294.
which will prejudice a party, 291-294.
relevant facts by rules of legal policy, 289.
the commission by a party of other and independent crimes to establish the guilt of the party in the particular crime, 295.
the frequency of accidents at a particular place to establish the character of the place as dangerous, 295.
the quality of the general conduct of a party to establish the quality of his conduct in a particular instance, 294.
what has been done with uniformity by others engaged in same calling to establish that a particular business was conducted with due care in a particular instance, 294.
what was paid for other parcels of land, similarly situated, to establish the value of a particular parcel, 294.
rules as to the, 294, 295.
matters not within the, 295, 296.
that a party took precautions against the future is not admissible to establish an admission by that party of responsibility for the past, 294.
to show defendant to be a co-surety on a note, 326.
judicial,
defined, 282.
extra-judicial evidence distinguished from, 282, 283.
forms of, 283, 356-404.
judicial notice of, 405-408. See also Judicial Notice.
leases as, 315, 321.
maps as, 315.
objections to, 184, 185.
of,
an odor analyzed, 279-281.



Evidence, of an odor analyzed—*Continued*
reasoning in the, 280, 281.
pedigree, 312-314.
ultimate facts, 283, 284, 287. See also Ultimate Facts.
writings, 359-378. See also Documents, as evidence.
opinion, 347-355. See also Expert Testimony; Opinion, evidence.
parol evidence rule, 370-375. See also Parol Evidence Rule.
pleadings as, 91.
presumptions as to, 409-413. See also Presumptions.
proof required of plaintiff, 179.
real, 283-356, 358. See also Real Evidence.
reasoning distinguished from, 282.
record as, 318-320. See also Records.
rejecting of, 184, 185.
relevant facts as, 289.
re-opening of case to admit evidence inadvertently omitted, 396.
res gesta, 343-346.
rules of,
distinguished from other rules of law, 286-289.
statements of intention as, 338. See also Intention.
surveys as, 315.
testamentary statements of intention as, 339-342.
testimony, defined, 283.
topics relating to the law of, 405-428.
Evidential Facts, 218, 219, 280, 283, 284, 347, 348, 405.
defined, 283.
discovery of, 211, 212.
examples of, 283, 284, 347, 348.
may be disproved after being put in issue, 218.
not to be pleaded in equity, 218, 219.
of ultimate facts, 405.
opinion of jury formed by, 347.
ultimate facts distinguished from, 218, 219, 284.
Examination,
in chief, 393-399. See also Witnesses, examinations of.
of witnesses, 392-404. See also Witnesses, examinations of.
Exceptions,
to an answer in equity, 274, 275.
all grounds of objection for insufficiency should be made in exception, 274.
hearing on, 275.
in federal courts, 274.
must be signed by counsel, 274.
to impertinent facts in equity pleadings, 216.
to scandalous matter in equity pleadings, 218.
to the adverse ruling of the court on evidence offered, 184, 185.
to the arguments of opposing counsel, 184, 185.
to the instructions to jury, 186.

Exclusion, of witnesses from court, 396. See also Witnesses, exclusion of.
Execution,
of judgment, 554-565.
defined, 554.
cannot be issued until judgment is rendered, 556.
capias, 555, 556. See also Capias, Writ of.
execution of writ, 559-562.
by duly qualified officer of the court, 560.
cannot be executed by one interested in judgment, 561.
controlling the, 559, 560.
staying the, 559, 560.
who may execute, 560-562.
exemptions from, 39.
fieri facias, 555.
form of, 558, 559.
garnishment,
distinguished from, 474.
in aid of execution, 475, 476.
issuance of the writ, 554, 556-559.
after a year and a day, 557.
after judgment has become dormant, 557.
implied power of court in, 554.
only court which rendered judgment can issue, when, 558.
who may issue, 558.
writ in the hand of a sheriff not considered as having been issued, 556.
judgment should be entered on record before execution, 556.
kinds of, 554-556.
levy should be made before return day, 564, 565.
nature and effect of, 564, 565.
on findings of court in action tried without jury, 163.
on verdict, 195.
ought to be appropriate to the judgment to be enforced, 554.
prevention of, by death, 557, 558.
return of writ, 565.
sale of property by sheriff, 565.
sheriff, right of,
to bond of indemnity from judgment creditor, 562, 563.
to break in, when, 563, 564.
residence, rule in regard to, 563, 564.
stay of,
by appeal, 195.
by supersedeas, 197.
by writ of error, 196, 197.
Executor,
attachment of property by, or of property in hands of, 434, 435.
exemption of, from garnishment proceedings, 477, 480.

Expert Opinion, as evidence, when, 353-355. See also Expert Testimony.
Expert Testimony, 353-355.
admissible as evidence, when, 353.
based upon hypothetical questions, illustration of, 354.
expert witness,
must base his opinion upon undisputed facts or facts assumed to exist, 353, 354.
one with special or technical knowledge of, or training in, the matter upon which opinion is expressed as an, 353.
qualification of, a question of fact for the court, 353.
who is an, 353.
how presented, 353-355.
legal matters as the subject of, 355.
medical matters as the subject of, 354, 355.
value as the subject of, 355.
Extraordinary Remedies, 567-627. See also Certiorari, Writ of; Habeas Corpus, Writ of; Mandamus, Writ of; Prohibition, Writ of; Quo Warranto Proceedings.
analogies of, in equity, 569-571.
at common law, 567-569.
bar to
an ordinary remedy a, 584-586.
another remedy must be adequate to be a, 586-588.
remedy in equity not a, 588, 589.
Massachusetts rule contra, 588, 589.
statutory remedy generally a, 586.
costs in, 591.
discretion of the court in issuing, 589, 590.
motion for leave to file petition, 577.
petitioner for, must come into court with clean hands, 569.
proceedings in, how and when begun, 577, 578.
purpose of, 567, 568.
the trial, 590, 591.

Facts,
allegation of, 63. See also Allegations.
collection of, in preparation for an action, 17.
conclusion of, not required in pleadings, 63, 219, 220.
evidence of, not required in pleadings, 63.
evidential, 218, 219, 280, 283, 284, 347, 348, 405. See also Evidential Facts.
finding of, by the judge, 145.
in an equity action, 211, 220, 248, 265, 267.
admission of the facts, 211, 248.
binding on the parties, when, 267.
demurrer admits of facts pleaded, 248.
how to be stated, 212.
irrelevant facts, 265.

Facts, in an equity action—*Continued*
issues of fact, 211, 213.
statement of facts in pleadings, 212-220.
ultimate facts, 211, 214, 218, 219, 246.
irrelevant, inadmissible in evidence, 284, 285.
issue of,
trial by jury of, 590, 591.
pleading of, 97, 98, 212-220.
questions of law and fact, 425-428. See also Questions of Law and Fact.
relevant, admissibility of, 289.
statement of, necessity for a full, by client to his attorney, 105.
ultimate, 211, 214, 218, 219, 246, 283, 284, 287, 288, 405. See also Ultimate Facts.

Fictions, to gain jurisdiction, by ancient English courts, 11.

Fieri Facias, Writ of, 555.
defined, 555.
at common law, 555.
under statutes sheriff may sell land belonging to the defendant, 555.

Fixtures, trover, action of, for removal of, when, 43, 44.

Force, necessary to maintain an action of forcible entry or detainer, 53, 54.

Forcible Entry or Detainer,
action of, 51, 53, 54.
force necessary, 54.
lies for the recovery of land taken by force, 54.
origin of, 52, 54.
questions involved, 54.
regulated by state statutes, 54.

Foreign Corporations, attachment of property of, 435.

Franchise,
defined, 609.
powers distinguished from, 609.
usurpation of a, by corporation,
forfeiture for, 609.
quo warranto for, 609.

Fraud,
action for, issuance of the writ of capias ad respondendum, 637.
attachment of property of debtor,
for fraud in contracting a debt, 440-442.
on account of fraudulent disposition, 438-440.
vacation of judgment for, 538.

Garnishment, 474-497. See also Trustee, process.
defined, 474.
administrators as a general rule are exempt from, 477, 480.

Garnishment—*Continued*
answer of garnishee, 491-495.
before a justice of peace, 494.
duty of garnishee to answer, 491.
effect of, 494, 495.
equivocations, effect of, 492.
evasive answer treated as a nullity, 492.
failure to answer, effect of, 491.
filing of, 491.
information received from others should be included in, 492.
interrogatories by plaintiff,
must be confined to such matters as under the law necessarily involve the garnishee's liability, 493.
required to be answered, 491, 492.
refusing or neglecting to answer, 496, 497.
entering of conditional judgment, 496.
may be treated as contempt, 496.
scire facias, issuance of writ of, 496, 497.
when a corporation, 493.
application for garnishee summons, 486.
affidavit, 486, 487. See also Affidavit, in application for garnishment proceedings.
attachment distinguished from, 475.
bonds in, 488.
clerks of court, funds held by, not subject to, 480.
corporation may be subject to, 476.
defenses, 494, 495.
derived from a custom which at an early date obtained among merchants of London, 474.
enforcement, manner of, 486-497.
essentials to, 477, 478.
execution distinguished from, 474.
executors as a general rule are exempt from, 477, 480.
exemption from, 490.
garnishee,
defined, 474.
liability of,
as co-debtor, 484, 485.
as debtor of the defendant, 478, 481-485.
aim of proceeding, 481, 482.
conditional debts, 483.
debt,
must be an absolute debt, 483.
must be paid in money, 482.
need not be due, 483.
in effect a suit to collect debt or judgment, 481, 482.
rule, basis of, 482.
uncertain debts, 483.

Garnishment, garnishee, liability of—*Conti*
as joint debtor, 485.
as partner, 485.
for property, 478-485.
in respect to property of the defen
character of the property, 478.
example of, 478.
personal property, 478.
property must be in the actual
478, 479.
on promissory notes, 483, 484.
after maturity, 484.
before maturity, 483, 484.
general rule, 484.
in aid of attachment, 475, 476.
distinguished from garnishment in ai
example of, 475.
judgment suspended until determinati
in aid of execution, 475, 476.
distinguished from garnishment in aid
example of, 475, 476.
judgment rendered against garnishee
issuance of writ, 488, 489.
a ministerial act, 489.
by plaintiff's attorney, 489.
issue, trial of, 494, 495.
as in ordinary actions, 494.
judgment against garnishee, 497.
in name of original defendant for use
must be for a certain sum, 497.
kinds of, 475, 476.
married woman may be subject to, when
money in the custody of the law not subj
application of the doctrine, 480.
example of, 480.
in Massachusetts, 480.
limitation upon the operation of the d
municipal corporations not subject to, un
statute, 476.
nature of remedy, 474-485.
notice to garnishee, 488, 489.
officers and agents of the government of
States are exempt, 477.
origin of, 474.
partakes of the nature of an injunction,
payment of sum in court exonerates garn
497.
persons subject to, 476, 477.

Garnishment—*Continued*
public officers, funds held by, not subject to, 480.
purpose of, 474, 475.
to compel garnishee to disclose under oath whether he is indebted to the defendant, 475.
receiver, money held by, not subject to, 480.
right of action by defendant against garnishee essential, 477.
exception to, 477, 478.
right of defendant and others in the proceedings, 495, 496.
by interpleading, 496.
under statutes, 496.
service of the writ, 489-491.
by any person authorized to serve process, 489.
endorsement of manner of service by officer, 491.
on non-resident temporarily within state, 490.
service by publication not sufficient, 490.
service must be personal, 489.
summons, 489-491.
amendment of, 491.
the writ, 488, 489.
amendment of, 491.
trust funds, not subject to, 479, 480.
example of, 479.
Gas,
mandamus against gas company, 595.
quo warranto proceedings against gas company, 609.
General Appearance, 105, 106.
General Demurrer, 111. See also Demurrer.
General Issue, Plea of,
must be pleaded as such, 135.
nil debet, 119, 123.
non assumpsit, 122, 123.
non cepit, 119, 123.
non detinet, 124.
non est factum, 119, 123, 124.
not guilty, 119, 124, 125.
nul tiel record, 124.
Governor, mandamus denied against a, 596, 597.
Grand Jury,
indictment by, 644.
no true bill found, effect of, 643.
Guardian and Ward,
attachment of ward's property held by guardian, 435.
guardian,
ad litem, 225, 226.
appointment of, 225, 226.
father as, 226.
custody of ward, writ of habeas corpus by guardian for, 648.

Guardian and Ward, guardian—*Continued*
unlawful restraint of ward by, writ of habeas corpus against guardian for, 639.
ward,
investment of funds of, 506.

Habeas Corpus, Writ of, 568, 569, 574-576, 579-581, 584-592, 615-627, 629-653.
defined, 568, 629.
application for, 647-649.
by,
friend on behalf of the prisoner, 648.
guardian for the custody of ward, 648.
master for custody of apprentice, 648.
one entitled to relief, 647.
parent for custody of child, 648.
special bail for custody of principal, 648.
wife on behalf of her husband, 648.
must be made by petition, 649.
who may apply, 647, 648.
a prerogative writ, 579, 630.
bars to the issuance of, 584-588.
called,
an extraordinary writ, 630.
writ of right, 630-631.
costs in, 591.
custody, defined and explained, 615.
decision in appeal from, 581.
discretion of the court in issuing, 589, 590.
dismissal of, 651.
forms of, 631, 632.
granted at law, not in equity, 569.
Habeas Corpus Act of England, 632.
adopted in various states in America, 632.
habeas corpus ad respondendum, 631.
habeas corpus ad satisfaciendum, 631.
habeas corpus ad subjiciendum et recipiendum, 631.
habeas corpus ad testificandum, 631, 632.
hearing on, 650, 651.
issue of law and fact, 651.
merits of writ, when, 650, 651.
petitioner may controvert, or traverse, the return, 651.
history of, 632.
in early English law, 575.
in early settlement of Canada, 576.
in the American Colonies, 575, 576.
issuance of,
by federal and state courts, 592, 648, 649.

Habeas Corpus, issuance of—*Continued*
for,
breach of constitutional guaranties in the trial and punishment of an accused for crime, 635.
denial of an accused to bail, when, 644.
detention of apprentice by person other than master, 639.
error in commitment papers, 623.
error in sentence, 623.
excessive bail, when, 644.
illegal custody of child by person other than parent, 639.
illegal imprisonment, 629, 635.
illegal restraint of liberty of,
child by parent, 638.
ward by guardian, 639.
wife by husband, 638.
imprisonment by court which lacks or exceeds its jurisdiction, 644-646.
kidnapping of scholar, 641.
restraint of servant by master, 640.
issues tried in same manner as ordinary actions, 590.
jurisdiction of,
federal courts, 592, 616-620.
Chinese Exclusion cases, 619, 620.
classes of cases, 617.
illustrations, 616, 617.
in cases of aliens who are in custody for acts done under the authority of their governments, 619.
Neagle case, 618, 619.
under Revised Statutes of the United States, 617-620.
where person is in the custody of state court, 616, 617.
state courts, 616, 617, 620, 621.
where person is in the custody of federal court, 616, 617.
where person is under legislative custody, 620, 621.
law of, 629-653.
nature of the, 630, 631.
not granted by default, 590.
obedience to the, 651, 652.
object of the, 630.
origin of, 574-576, 631, 632.
personal liberty, limitations on the right of, 633-641. See also Personal Liberty.
petitioner in, who may be, 580, 581.
petition for, motion of leave to file, 577.
proceedings under, 630.
respondent,
directing the writ to the, 649, 650.
must answer within time named in writ, 650.
return of writ, 621, 622, 650.

Habeas Corpus, return of writ—*Continued*
duty of officer to make return, 621.
right of a person to freedom from restraint, 574, 575.
signing of the, by the court, 649.
suspension of, 624-627, 652.
as to aiders or abettors of the enemy, 626.
by Congress, 625, 626.
by Massachusetts during Shay's rebellion, 627.
by the President of the United States, 624, 625.
by the states, 627.
cases where suspended, 652.
McCardle case, 626, 627.
Merryman case, 625.
Milligan case, 626.
under Article 1, Sec. 9, of the United States Constitution, 624,
the writ itself, 649, 650.
unlawful restraint, what constitutes, 615, 642.
commands, 642.
examples of legal and illegal detention, 646.
present constraint necessary, 642.
words, 615.
will not issue,
where person is lawfully forced to surrender his personal lib
633.
where special bail has principal arrested in order to surrender
to the court, 641.
Handwriting, opinion of ordinary witness as to the genuineness of,
Hearsay Evidence,
defined, 305.
exceptions to the rule in regard to, 308-346.
account books of parties to the litigation, introduction of, 326
See also Account Books.
ancient documents, introduction of, 320-323.
declarations,
as to matters of public or general interest, 314-318. See
Interest.
bearing upon the physical or mental condition of the decla
or upon his intention, 335-342. See also Intention.
in questions of pedigree, 312-314. See also Pedigree.
which are a part of some fact or transaction that is itself
missible, 343-346. See also Res Gesta.
dying declarations, 310-312.
entries and declarations,
against interest, 323-326.
of third parties made in the regular course of duty or busi
331-335.
public documents, introduction of, 318-320.

Hearsay Evidence, exceptions to the rule in regard to—*Continued*
testimony at former trial, introduction of, 308-310. See also Testimony.
how dealt with, 307.
inadmissibility of, 305-308.
rule stated, 305.
exceptions to the rule, 308-346.
matters not within the rule, 306.
typical cases, 306, 307.
reason for the rule, 305, 306.
method of the courts in establishing, 307.
rule as to,
matters not within the rule, 306, 307.
typical cases, 306, 307.
reasons for the rule, 305, 306.
Hundred-Court, 10.
Husband and Wife,
privileged communication between, 391, 392.
anti-marital privilege, 391.
at common law, 391.
privilege,
death or divorce may destroy, 391.
may be waived by either husband or wife, 391.
privileged marital communications distinguished from anti-marital privilege, 391, 392.
restraint of liberty of wife by husband, 637, 638.
illegal, writ of habeas corpus against husband for, 638.

Idiots, actions by, at law and in equity, 224.
Immigration. See also Aliens; Chinese Exclusion Cases.
admission of aliens within exclusive control of Congress, 624.
Impeachment, of witnesses, 397-403. See also Witnesses, impeachment of.
Imprisonment,
of a person,
defined, 615.
by court which lacks or exceeds its jurisdiction, writ of habeas corpus on account of, 644-646.
cannot be legal unless there is a legal limitation on his right of personal liberty, 633, 634.
for judgment debt, 637.
writ of habeas corpus allowed, when, 637.
what may constitute, 615, 642.
writ of habeas corpus allowed for the illegal, when, 634.
Incompetency, of witnesses, 379-383. See also Witnesses, incompetency of.
Infants,
actions against, as defendants, 225, 226.
failure of infant to plead will not give judgment by default, 226.

Intention, testamentary, statements of—*Continued*
Sugden v. Lord St. Leonards, rule of, 342.
to establish the contents of a lost will, 341, 342.
to impeach a will for fraud, duress or undue influence, 340.
to show execution of a will, 340.
to show mental condition of testator, 340, 341.
Interest,
declarations against,
admissions distinguished from, 323, 324.
evidence of, 323-326.
must have a plain tendency to charge the declarant or maker, 324.
rule stated, 323.
statements incorporated with declarations against interest, 325, 326.
public or general,
defined, 315, 316.
declarations of,
defined, 315.
as evidence,
assertions of individuals, 315.
declarant must be dead, 317.
declaration must be made ante litem motam, 317.
examples of, 315-317.
exception explained, 315.
of deeds, leases, maps, and surveys, 315.
of private boundaries, in England and the United States, 318.
rule stated, 314, 315.
Interrogatories, written, 153.
Interrogatory Part, in the bill in equity, 232, 235, 236.
Involuntary Non-Suit, 182. See also Non-Suit.
Irrelevant Facts, 265.
defined, 265.
classes of, 265.
inadmissible in evidence, 284, 285.
in pleadings in equity, 265.
Issues. See also Actions; General Issue, Plea of.
closing of, 143-145.
effect and importance of, 27, 28.
of law and of fact, 27, 28.

Joinder,
of actions, 69, 76-78.
at common law, 76, 77.
in equity, 242, 243.
of same party, 76.
origin of, 77.
stating several distinct causes of action, 78.
under statutes, 78.
under the codes, 76.

Judgments, foreign—*Continued*
jurisdiction of court rendering judgment may be questioned, 533.
in rem, 520, 521, 552, 553.
defined, 552.
binding on strangers, when, 552, 553.
res must be within territorial jurisdiction of the court, 520.
without service of process on persons interested, 520, 521.
instructions to jury distinguished from, 500.
interlocutory orders entered during the progress of the trial distinguished from, 500.
jurisdiction of the court essential, 501-504.
illustrated, 502-504.
modifying of, 534, 535.
motion in arrest of, 16, 28, 29, 74, 162, 193, 194. See also Motions.
nature and essentials, 499-528.
not on the merits, not a bar, 539, 540.
obedience to statutory requirements of procedure essential to the validity of, 525-528.
affirmative view, 526, 527.
contra view, 527, 528.
of,
a court of a government not recognized by another government, effect of, 505, 506.
a de facto court officer, effect of, 508.
an unconstitutional court, effect of, 506, 507.
prize courts are conclusive evidence of the facts upon which they proceed, 553.
probate court sitting in a town other than county seat, void, 510, 511.
on action which did not state all grounds for recovery or defense, 536-538.
on demurrer, appeal from, 28.
on finding of court in action without a jury, 162.
on part of a cause of action, renders recovery on other part, impossible, 535, 536.
on the merits, a bar, 539.
on verdict, 194, 195.
opinion distinguished from, 500.
payment of, by one defendant releases all the other defendants, 74.
plaintiff may recover as many, as he likes, but is entitled to only one satisfaction, 74.
privies to, 549, 550.
pro confesso, 275, 276, 508, 509.
ruling of the court on the admission of the evidence offered, distinguished from, 500.
to be conclusive upon parties must be responsive to the matter controverted, 523.
upon matter outside of pleading will make judgment void, 525.

Judgments—*Continued*
upon service of notice upon a member of defendant's family, held insufficient, 515.
vacation of, 534, 535, 538.
during the vacation of the court under statute, 508.
for fraud, 538.
not permitted after the term at which judgment was rendered, 535.
voidable, when, 622.

Judicial Legislation, example of, 428.

Judicial Notice, 405-408.
doctrine of, 405, 406.
explained, 405, 406.
relation of the law of evidence to the, 408.
establishes a fact only prima facie, 407, 408.
may still be shown to be otherwise, 407.
of matters,
accustomed to be judicially noticed, 406.
because everyone knows them, 406, 407.
because the court must know them, 407.
required by statute to be judicially noticed, 406.

Jurisdiction,
defined, 501, 511.
essentials of, 501, 504.
illustrated, 502-504.
jurisdiction obtained over defendant by process, 503.
submission of the plaintiff to, 503.
that there is a court created by law organized and sitting, 502.
whether the facts alleged in the pleadings warrant the court in giving judgment, 502, 503.
whether the relief prayed for was given, 504.
in equity, defined and explained, 514.
of,
courts, 511-528, 646.
based upon a fatal defect, judgment void, 646.
depending upon relief prayed, 511.
determined how, 512.
error in,
detention on account of, not illegal, 645.
not grounds for issuance of the writ of habeas corpus, 646.
renders proceedings voidable, 645.
essentials of, 525.
examination of the, by attorney for defendant, 105.
in certiorari, habeas corpus, mandamus, prohibition and quo warranto, 591-593. See also Certiorari, Writ of; Habeas Corpus, Writ of; Mandamus, Writ of; Prohibition, Writ of; Quo Warranto Proceedings.
in civil cases, 512.

Jurisdiction, of courts—*Continued*
in criminal cases, 512.
in equity actions, 247, 256.
jurisdiction, defined, 501, 511.
lack of, or excess of, effect of, 644-646.
of the person, 514-519.
notice, service of, 514-519. See also Process.
voluntary appearance, 514.
of the question, 521-525.
Munday v. Vail, rule of, 524-525.
prayer for relief should be read to determine, 525.
principle illustrated, 521-525.
Reynolds v. Stockton, rule of, 521-524.
test, 525.
of the thing, 519-521.
beyond territorial jurisdiction of the court, when, 520.
procedure whether jurisdictional, 525-528.
to decide every fact necessary to determine cause before it, 511, 512.
matters of fact, determined how, 501.
matters of law, determined how, 501.
Jurors. See also Jury.
challenging of, 167-169.
challenge for cause, 168.
challenge to array, 167.
peremptory challenge, 168, 169.
drawing of, 165, 166.
examination of, 166, 167.
excusing of, by court, when, 168.
lists of, how prepared, 165, 166.
persons exempt as, 166.
qualification of, 164, 165.
summoning of, 165.
Jury. See also Jurors.
defined, 164.
argument to, 187, 188.
challenging of, 167-169. See also Jurors, challenging of.
commissioners, 165.
deliberations of, 189, 190.
drawing of, 165, 166.
evidence cannot be introduced which will mislead the, 291.
instructions to, 186-189. See also Instructions to Jury.
lists, 165, 166.
on motion to direct verdict the, has no discretion in the matter, 183.
opinion of, on evidential facts, 347.
originally was a body of witnesses drawn from the vicinage, 290.
persons exempt from service on, 166.
polling of, explained, 191.

Jury—*Continued*
province of, to determine the existence or non-existence of facts, 290, 347, 348.
swearing of, 169, 170.
taking case from, 427, 428. See also Trial.
trial by,
in federal courts, 590, 591.
in proceedings for writs of certiorari, habeas corpus, mandamus, prohibition and quo warranto, 590, 591.
in state courts, 590, 591.
law of evidence an offspring of the, 290.
right to, 159, 164-170.
cannot be abridged, 159.
denied in equity and probate proceedings by statute, 164.
in civil and criminal actions by state constitutions, 159, 160, 164.
in England, 159, 164.
in the United States, 159, 164.
verdict of, 190-192, 426, 427. See also Verdict.
view of place in litigation by, under direction of court officer, 357.
waiver of, 160. See also Non-Jury Cases.

Laches, petitioner for an extraordinary remedy must not be guilty of, 569-571.
Landlord and Tenant,
relation of,
may be shown by parol evidence, 365.
Larceny, evidence of honesty of party accused in case of, 299.
Law and Fact. See Questions of Law and Fact.
Leading Questions,
defined, 397.
inducements which may permit court to allow, 397.
not objectionable on cross-examination, 399, 400.
objectionable, when, 397.
Leases,
as evidence, 315, 321, 365.
of their contents and terms, 365.
old leases admissible to prove ancient possession, 321, 322.
notice of landlord to tenant to quit premises, 368.
Libel and Slander,
evidence of character of one of the parties allowed, when, 301.
pleadings in an action for, 93.
Liens, of attachment, 431-473. See also Attachment.
Logic, other tools than, are necessary to the common law, 290.
Lunatics. See Insane Persons.

Malicious Prosecution,
evidence,
hearsay, of third parties admissible, when, 306.

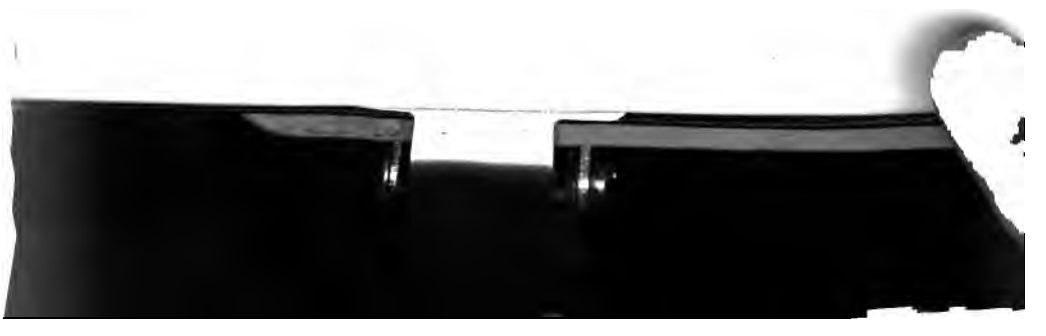
Malicious Prosecution, evidence—*Continued*
of character of plaintiff allowed in, 299.
instructions to jury in, 427.
probable cause in, 427.
questions of fact, what are, in, 426, 427.
for the court, 427.
for the jury, 426.
Mandamus, Writ of,
defined, 567.
against,
corporations, 594, 595. See also Corporations.
gas company, 595.
officers, 595-598. See also Public Officers.
railroad, 595.
street railroad, 587.
telephone company, 595.
alternative writ, 583, 584.
exceptions to the use of the, 583.
must contain specifically all averments of fact, 583.
object of, 583.
return of, 583, 584.
a prerogative writ, 579.
bar to, 584-588.
compels the performance of duties which are ministerial, statutory, or are the necessary result of the office, 598.
costs in, 591.
demand and refusal in, 578.
denied against,
Commissioner of Land,
to cancel land entry, 598.
to procure a title to public land, 589.
governor of the state, 596, 597.
Lords of the Treasury in Great Britain, 596.
postmaster-general to readjust a postmaster's salary, 598.
President of the United States, 596.
when it will work hardship to third parties not before the court, 589.
when the duty to be performed is too complex for court to superintend performance, 590.
discretion of the court in issuing, 589, 590.
no appeal from adverse ruling, 590.
enforcement of,
by laws of religious or social association, 595.
discretionary powers, 598, 599.
obligations which rest upon contract and involve no question of official duty, 599.
example of, 567.
granted,
at law, not in equity, 568.

Mandamus, granted—*Continued*
opinion of United States Supreme Court on, 568, 569.
when, 578.
issue tried as in ordinary actions, 590, 591.
jurisdiction of,
federal courts to issue, 592, 594.
in aid of jurisdiction, 592.
to compel removal of a cause from state court, 594.
state courts to issue, 594.
in aid of appellate jurisdiction, 592.
to compel removal of a cause from federal court, 594.
United States Supreme Court to issue, 594.
not granted by default, 590.
origin of, 571.
petitioner in,
must not be guilty of laches, 570.
who may be, 579.
petition for, motion of leave to file, 577.
respondent in,
who may be, 581, 583.
to vacate an order, 586.
what duties it enforces, 598, 599.
Maps, as evidence, 315.
Marriage, declaration of, as evidence, 312, 313.
Married Women,
actions by and against, at law and in equity, 224.
attachment of property of, 435.
garnishment of property of, when, 477.
Master and Apprentice, relation of, limitations incident to the, 639. See also Apprentice; Master and Servant.
Master and Servant,
master,
restraint of liberty of servant by,
not permitted by the Constitution of the United States, 640.
permitted as to children under twenty-one years, 640.
writ of habeas corpus for, 640.
Maxim, "He who would seek equity must do equity," 58.
Medicine, medical matters as the subject of expert opinion, 354, 355.
Motions,
attacking defects in pleading, 114, 115, 117.
for judgment on pleadings, 154.
for new trial, 28, 162, 193. See also New Trial.
allowed, effect of, 193.
argument on, 193.
effect of, 194.
in actions tried without jury, 162.
in arrest of judgment, 16, 28, 29, 74, 162, 193, 194.
filing of, 28.

Motions, in arrest of judgment—*Continued*
for error, 193, 194.
in actions tried without jury, 162.
misjoinder and nonjoinder of parties may be taken advantage of by, 74.
not favored by the courts, 28, 29.
statute of Edward III forbidding, on a mere form of pleading, 16.
to advance cause, 157.
to continue the cause, 157, 158.
application for, 157.
grounds for, 158.
to direct verdict, 183, 184.
by defendant, 183.
by plaintiff, 183, 184.
operates as demurrer to the evidence, 183.
overruled, exceptions to, 184.
to dismiss,
bill in equity for failure to state cause of action, 244.
to make pleading more specific, 23, 24, 114, 125.
to quash, 151, 584.
to set aside a default, 155.
to strike out,
adversary's pleadings, 154.
impertinent facts in equity pleadings, 216, 244.
plea, 26.
scandalous matter in equity pleading, 218, 244.
to suppress deposition, 178.
Multifariousness, 242, 243, 249, 250.
defined, 242.
forbidden, 242, 243.
plea of, to bill in equity, 249, 250.
allowed, when, 250.
objectionable, when, 249.
Municipal Corporations,
attachment of property of, not permitted, 435.
garnishment of property of, under statute, 476.
imprisonment under void ordinance, writ of habeas corpus for, 643.
quo warranto proceedings against, 606, 607.
corporation of London in early English history, 606, 607.
in early English law, 606, 607.
in the United States, 607.
writ of certiorari denied against, 602.
Murder,
evidence in, examples of, 284, 286, 287, 344, 345, 347, 348.
motive in, how determined by jury, 348.

Negative Plea,
to bill in equity, 252, 254-256.

Negative Plea, to bill in equity—*Continued*
answer in support of a, unnecessary, 255.
illustration, 255, 256.
limitations on, 255, 256.
must deny the facts in existence, 255.
purpose of, 254.
Negligence, effect of taking case from jury in cases of, 428.
New Trial,
motion for, 28, 162, 193.
allowed, effect of, 193.
argument on, 193.
denied, effect of, 193.
in actions tried without jury, 162.
remanding cause for, on appeal, 205.
Nil Debet, Plea of, 119, 123.
defined, 123.
denies the creation of an obligation, 123.
where action is in debt, 123.
Non Assumpsit, Plea of, 122, 123.
defined, 122.
denies that an obligation ever existed, 123.
goes to the first element of the action, 122.
in action of assumpsit, 122.
in action upon special contract, 122, 123.
Non Cepit, Plea of, 119, 123.
Non Detinet, Plea of, 124.
defined, 124.
denial of the detention of goods only, 124.
Non Est Factum, Plea of, 119, 123, 124.
defined, 123.
denies only the binding force of the alleged deed, 124.
proper only when action is founded on sealed writing, 123.
Non-Jury Cases, 159-163. See also Trial, of cases without jury.
Non-Resident,
attachment of property of non-resident debtor, 436, 437. See also Attachment; Debtor.
service by publication on, 457.
judgments against, 515, 519.
agent of, 518, 519.
exceptions to rule, 517-519.
in England, 515, 516.
rendered,
in personam, effect of, 516.
in rem, 515.
views of the United States Supreme Court on, 516, 517.
Non-Suit, 181, 182, 428.
involuntary, 182.
voluntary, 181, 182.



Not Guilty, Plea of, 119, 124, 125.
in an action of replevin, 125.
in an action of trespass, 124, 125.
in an action of trespass on the case, 125.
in an action of trover, 125.
Notice,
filing and publication of, in a cause of action, 18, 19.
judicial, of evidence, 405-408. See also Judicial Notice.
to defendant,
constructive notice, when, 104.
essential to due process of law, 104.
of intention to file cause of action, effect of, 18, 19, 103, 104.
to parties to an action, 69.
waiver of, by defendant, 106.
Nuisances, assignment of right of action for maintaining, 71.
Nul Tiel Record, Plea of, denies the existence of the record, 124.

Oaths,
suppletory,
correction of account books verified by, at common law, 330.
Objections,
to argument of opposing counsel, 184, 185.
to rejection of evidence, 184, 185.
Odor,
evidence of an, analyzed, 279-281.
reasoning in the, 280, 281.
Officers,
public,
mandamus proceedings against, 595-598. See also Public Officers.
quo warranto proceedings against, 610, 611, 613, 614. See also Public Officers.
Open and Close,
closing argument to jury, 187.
waiving of, 187.
opening statement, 172, 173, 187.
of defendant, 173.
of plaintiff, 172, 173.
right to, in trial of civil actions, 171, 172.
Opinion,
evidence, 347-355. See also Expert Testimony.
admissible, when, 349-351.
it will aid court to decide case in which it is necessary to pass upon a matter of opinion, 349.
it will help the jury, 349.
typical cases, 349-351.
rule stated, 347.
explanation of rule, 347, 348.

Opinion—*Continued*
expert, 353-355. See also Expert Testimony.
matter of fact and matter of,
distinguished, 349.
no hard and fast line separating, 349.
of jury,
on evidential facts, 347, 348.
of witnesses, when admissible as evidence, 347-355.
Oyer, demand of, in pleading, explained, 97.

Pardon, executive, wipes out all liability for punishment, 647.
Parent and Child,
parent,
custody of child, right to, by, 638.
may be enforced by writ of habeas corpus against person who usurps parental right, 639, 648.
punishment of child, right of, by, 638.
restraint of liberty of child by, 638, 639.
unlawful, writ of habeas corpus against parent for, 638.
Parol Evidence Rule, 370-375.
explained, 370.
in contracts,
parol evidence not within rule,
to explain alteration, 373.
to show,
contract to be ineffectual, 371.
failure or lack of consideration, 371.
how expressions are affected by extrinsic circumstances, 375.
real purpose of contract, 373.
substitution of a new agreement, 372.
the meaning of expressions in an instrument, 375.
whole bargain, 372.
parol evidence within rule,
to show,
a collateral agreement, 372.
a custom, 372, 373.
in wills, 373-375.
reason for, 375.
words which have been omitted from will cannot be added by parol evidence, 373, 374.
"parol," use of the word distinguished from use of the word "oral," 370.
scope of the, 370.
written instruments may be excluded by the, 370.
Parties,
defendant, 5, 72, 149, 150. See also Defendant.
names of, should be correctly set forth in praecipe, 147, 148.
plaintiff, 5, 71, 72, 148-150. See also Plaintiff.

Parties, plaintiff—*Continued*
joint plaintiffs, who may be, 149, 150.
natural person as, 148.
who should be the, 148, 149.
"probing the conscience of," in equity, explained, 220.
to an action at law, 5, 69-76, 81, 86, 87.
certainty as to names of, in the pleadings, 81, 86, 87.
defendant, defined, 5.
executor as a party, 70.
for tort, 72-74.
all defendants must answer as to their interest, 73.
separate actions, 73.
joint and several rights and liabilities of, 71, 72.
misjoinder and nonjoinder of, 74-76, 150, 182.
at common law, effect of, 74.
may be taken advantage of,
by demurrer, when, 74.
by motion in arrest of judgment, 74.
no liability for failure to take advantage of, 75.
non-suit on account of, 182.
of defendant, effect of, 150.
of plaintiff, effect of, 150.
under the codes of procedure, effect of, 74.
names of, 70.
necessity for, 4, 5.
notice to, 69.
on an assignment of a contract, 70.
plaintiff defined, 5.
real party in interest, 70.
to an action in equity, 223-229.
aliens as, 223, 224.
amendment to bill to include proper, 271.
classes of, 227, 229.
formal parties, 227.
idiots and lunatics as, 224, 225.
indispensable parties, 227.
infants. See also Infants.
as defendants, 225, 226.
as plaintiffs, 225.
insane persons as, 224, 225.
in the federal courts, 227.
joinder of, 226-229.
exceptions to the rule, 228-229.
married women as, 224, 225.
misjoinder or nonjoinder, 246, 247.
necessary parties, 227, 228.
numerous parties, all of which could not be joined without delay, need not be joined, 228, 229.

Parties, to an action in equity—*Continued*
out of jurisdiction of the court need not be joined, 228, 229.
proper parties, 227.
trustee as a party, 70.
under codes of procedure, 73.
who may be, 69.

Partnership,
action against, joinder of partners unnecessary, when, 229.
dissolution of, all partners to be made parties, 229.
garnishment of partner, 485.

Pedigree,
declarations of,
defined, 312, 313.
evidence of, 312-314.
admissible, when, 312-314.
all conditions of the rule must be satisfied, 313.
an exception to the hearsay evidence rule, 312-314.
declarant must be related by blood or marriage, 313, 314.
declaration to be made ante litem motam, 314.
of birth, death, legitimacy or marriage, 312, 313.
rule stated, 312.

Peremptory Challenge of Jury, 168, 169. See also Challenging of

Personal Liberty, 633-641.
limitations on the right of, 633-641.
incident to the relation of,
guardian and ward, 639.
husband and wife, 637, 638.
master and apprentice, 639.
master and scholar, 640, 641.
master and servant, 640.
principal and special bail, 641.
legal, 633.
in their nature public or private, 633.
private, 633, 634, 637-641.
coercive of private obligations, 633, 637.
incident to certain civil relations, 634, 637, 638.
public, 634-637.
coercive of duties to the state, 633, 635, 636.
executive of duties to the citizen, 633, 636, 637.
punitive of crime, 634, 635.
right of, 633-641.
where person is lawfully forced to surrender his, writ of corpus will not prevail, 633.

Petition,
in equity pleading,
statement of facts in, 212-220.
conclusions of law not to be stated, 219, 220.

Petition, in equity pleading, statement of facts in—*Continued*
evidentiary facts not to be pleaded, 218, 219.
impertinent facts, 216, 217.
exceptions to, 216.
motion to strike out, 216.
matters which need not be stated, 215, 216.
must be certain, 213, 214.
must be positive, 212, 213.
orderly and systematic statement required, 214.
purpose of, 212.
scandalous matter, 217, 218.
sufficient, when, 214.
ultimate facts, 211, 214, 218, 219, 246.
unnecessary facts, 217.

Place, certainty in pleadings as to, 81, 85, 86.

Plaintiff, 5, 71, 72, 148-150.
defined, 5.
adult, alien, club, corporation, infant, insane person, natural person or society as, 148.
joint plaintiffs who may be, 149, 150.
pleadings of, in equity, 17, 230-244.
proof necessary of, 179.
who should be the, 148, 149.

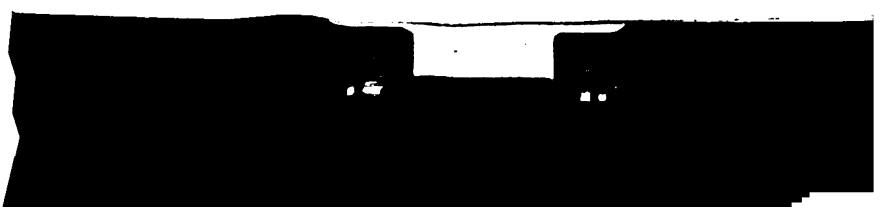
Pleading,
defined, 1, 2.
allegations, 2, 20, 63-66. See also Allegations.
answer. See Answer.
as evidence, 91.
character of,
determines the methods adopted in the trial of the cause, 152.
equity, 5, 12, 13, 25, 30, 59, 100. See also Equity Pleading.
examples of, 29, 30.
fundamentals of, 207-222.
ignorance and indolence in preparing, effect of, 3, 5.
importance of, 3.
in ecclesiastical courts of England, 5, 13.
in the United States, 5, 6.
necessity of, 1-9.
oral,
allowable in states where not abolished by statute, 6.
by writ, 6, 7. See also Writs.
rules of,
attorney
should comply with, where he practices, 4.
should have intimate knowledge of, in state where he practices, 65.
disregard of,
productive of even more injustice than severity of the rules, 3.

Pleading, rules of, disregard of— *Continued*
works a hardship, 3, 4.
formulation of,
efforts of courts in the, 4.
should be strictly complied with, 4.
statutes on,
importance of the study of, 9.
modifying the rules of common law pleading in the United States, 13.
study of, not unreasonably difficult, 9.
sufficiency of, 1, 2.
systems of, 5. See also "under common law rules," under this heading; Equity Pleading.
under common law rules,
allegations, 2, 20, 63-66. See also Allegations.
ancient forms of expression,
have a legal meaning, 94.
should be followed, 94.
answer. See Answer, to a declaration.
averments. See Allegations.
conclusion, declaration in, should lay damages, 95.
confession and avoidance, 25, 26, 115, 129-132. See also Confession and Avoidance.
construction of, 222.
declaration, 1, 6, 7, 17, 20-23, 26, 50, 57, 63-66, 74, 77-79, 82, 95, 96, 101-104, 109-116, 118-129, 139, 140. See also Declarations, in pleading.
defects in the, 23, 24, 75, 114, 115.
of misjoinder or nonjoinder of parties, 75.
of the plaintiff, 23, 24.
which do not appear on the face of the pleading, 75.
defenses to, 137-139. See also Defenses.
demand for relief, 95, 96.
demurrer to pleadings, 22, 23, 26, 74, 109-114, 118. See also Demurrer; Special Demurrer.
denial of declaration, 1, 20, 25, 26, 115, 118-129, 132, 133, 136. See also Denial.
dilatory pleas, 21, 22, 106-109, 115-118. See also Dilatory Pleas.
entitling of pleadings, 98, 99.
essentials of, 20, 31.
expressions, forms of, 94.
facts, pleading of, 97, 98.
first, 17, 76, 79-104.
forms of, 55, 62, 79, 93, 94.
general issue, pleading the, 119, 120, 135. See also General Issue Plea of.
importance of having knowledge of, 6.
indefinite pleadings, 111-113.
in England, 5.

Pleading, under common law rules—*Continued*
insufficiency of pleadings, 20, 94, 111.
legal effect of written instrument to be pleaded, 93.
modified by codes of procedure, 61.
motions,
attacking defective pleadings, 114, 115.
discretion in making, 24.
for new trial, 28. See also Motions; New Trial.
in arrest of judgment, 16, 28, 29. See also Judgments; Motions.
to make pleading more specific, 23, 24, 112, 113, 115.
to strike out plea, 26.
of the defendant, 21, 26.
performance, pleading of, effect of, 83.
plaintiff's,
first pleading, 17, 76, 79-104.
reply to defendant's demurrer, 27.
second pleading, 141-143.
uncertainty of plaintiff's pleading, effect of, 23.
pleadings,
construction of, 97.
must
not be ambiguous, 89.
not be argumentative, 90.
not be by way of recital, 90, 92.
not be double, 81, 84, 85.
not be insensible nor repugnant, 89.
show title and authority, 81, 87, 88.
specify names of parties, 81.
tend towards an issue on the merits, 117, 118.
no departure from the, permitted, 133, 134.
number of, allowed, 27.
obscurity and confusion to be avoided in, 89, 90.
preparation of, 79.
should have their proper formal commencement, 90.
should not be alternative, 90, 92.
should observe known and ancient forms of expression, 90.
signing of, 101.
sufficiency of, 22, 23, 118.
things should be pleaded according to their legal effect or operation, 90.
pleas, 21-26. See also Dilatory Pleas; Pleas.
profert of sealed instruments, 96, 97.
rebutter, 27, 114.
recital of contents of written instrument, 96, 97.
rejoinder, 27, 114.
replication, 20, 26, 27, 111, 113, 126, 141-143. See also Replication.
rules of, 5, 6, 29, 67, 68, 81-84.
statements in, 20.

Pleas, of the defendant, to a bill in equity—*Continued*
of,
alienage, 257.
another action pending, 258.
attainder, 257.
bankruptcy, 257.
coverture, 257.
defect of parties, 258.
idiocy, 257.
infancy, 257.
multifariousness, 259.
multiplicity of suits, 258.
overruling of, effect of, 260.
pure pleas, 252, 253.
purpose of, 248, 249.
separate pleas to separate parts of bill, 250, 251.
statement of, 251.
to the discovery, 252, 256.
to the essentials of the bill, 256.
to the frame of the bill, 257, 258.
to the jurisdiction, 256.
to the person, 256, 257.
of the defendant, 258.
of the plaintiff, 257.
to the relief, 252, 256.
to the jurisdiction of the court, 21, 106.
to the merits of the action, 115.
Positiveness, in the statement of facts in equity pleading, 212, 213.
Post Office, mandamus denied against postmaster-general to readjust a postmaster's salary, 598.
Practice and Procedure,
acts in the United States modifying common law rules of procedure and pleading, 13.
in civil actions, 147, 205.
appeals, 195, 196, 198-205. See also Appeal; Error, writ of.
call of cases on calendar, 158.
charging the jury, 186-189. See also Instructions to Jury.
deposition of witnesses, 175-178. See also Depositions.
entering judgment, 193-197. See also Judgments.
exclusion of witnesses, 174, 175.
in non-jury cases, 159-163. See also Trial, of cases without jury.
instructions to the jury, 186-189. See also Instructions to Jury.
jury trial, 159, 164-170. See Jury, trial by.
open and close, the right to, 171, 172. See also Open and Close.
opening statement, 172, 173.
preliminary motions, 154-158. See also Motions.
preparation for trial, 147-170.
setting cause for trial, 158.

Practice and Procedure, in civil actions—*Continued*
swearing of witnesses, 173, 174. See also Witnesses.
the trial, 171-205.
what plaintiff must prove, 179. See also Evidence.
in early English courts, 56.
Praecipe, 102, 103, 147, 148.
defined, 147.
filing of, 102, 103, 147, 148.
Prayer,
for process in a bill in equity, 232, 239, 240. See also Bill in I
for relief in a bill in equity, 232, 238, 239. See also Bill in Equ
President of the United States,
mandamus denied against, 596.
suspension of the writ of habeas corpus by, 624, 625.
Presumptions, 409-413.
defined, 409.
are matters of substantive law, 410-412.
as to
absentees for seven years, 410.
children born in lawful wedlock, 411.
conclusive, so called, 411.
of an easement in use twenty years, 411.
of execution of a writing over thirty years old, 411.
doctrine of, explained, 409.
effect of, 409, 410.
on the burden of proof, 417, 418.
essential character and operations of, as far as law of evide
concerned, 412.
examples of, 410, 418.
facts which give rise to, 410.
function of, 409.
inaccurate notions concerning, 412.
in crimes, 410.
in sales, 410.
may operate as prima facie assumption, 409.
not part of the law of evidence, 409.
prima facie assumption or consequence, 409, 410.
rebutted, disappear, 409, 410.
sometimes are rules of procedure, 409.
Privileged Communications, 388-392.
defined, 388, 389.
cannot be disclosed without other person's consent, 389.
communications between,
attorney and client, 389-391.
all facts communicated not privileged, 390.
attorney must be acting in professional capacity, 389.
collateral facts not privileged, 389.
example, 390.



Privileged Communications, between attorney and client—*Continued*
how claimed, 390, 391.
made in furtherance of a criminal or illegal design not privileged, 389.
not terminated by death of attorney, 390.
privilege belongs to client, 390.
scope of privilege, 389, 390.
waiver of privilege, 390, 391.
when third party is present not privileged, 390.
husband and wife, 391, 392.
anti-marital privilege, 391.
at common law, 391.
considered confidential, 391.
privilege,
death or divorce may destroy, 391.
may be waived by either husband or wife, 391.
privileged marital communications distinguished from anti-marital privilege, 391, 392.
of witnesses, 383-388. See also Witnesses, privilege of.
Prize Courts,
judgments of,
are conclusive evidence of the facts upon which they proceed, 553.
Procedure, whether jurisdictional, 525-529. See also Practice and Procedure.
Process,
service of, 150, 151, 457-461, 514, 515.
at last place of residence, 515.
by notice in the market place in England, 515.
constructive, 458.
control of court of its officers in the, 559.
in actions for writ of attachment, 457-461.
actual service, 457.
at domicile of defendant considered as personal service in some states, 457.
by publication, 457-461.
as substitute for the summons, 460.
defective proofs of, 459.
defective service of, 460.
does not give the court jurisdiction, 459.
failure of record to show, judgment may be reversed for error, 459.
how effected, 458.
mailing of copy of, to defendant's last known address, 458.
on absconding debtor, 457.
on non-resident debtor, 457.
on one who stands in defiance of an officer, 458.
preserving proof of service, 458, 459.
statutory requirements, 458.
unknown at common law, 458.

Process, service of—*Continued*
in garnishment proceedings, 489-491.
by person authorized to serve process, 489.
endorsement of manner of service by officer, 491.
on non-resident temporarily within state, 490.
service by publication not sufficient, 490.
service must be personal, 489.
on corporations, 519.
on defendant, 17-19, 105.
on non-residents, 18, 19, 457, 515-519.
exceptions to the rule, 517-519.
personal, 457.
return of, duty of attorney for defendant to examine to ascertain if proper return is made, 105.
to secure jurisdiction over the person, 514, 515.
Prohibition, Writ of,
defined, 567, 568.
a prerogative writ, 579.
as used in early English courts, 571, 572.
bar to, 584-588.
costs in, 591.
demand and refusal in, 578, 579.
discretion of court in issuing, 589, 590.
no appeal from adverse ruling, 590.
example of, 568.
issued,
at law, not in equity, 568.
by the United States Supreme Court to the district courts, 591.
in lower federal courts in aid of jurisdiction, 592.
in state courts in aid of appellate jurisdiction, 592, 593.
to a court martial, 600.
to boards, commissions and officials vested with judicial powers, 600.
issue tried as in ordinary actions, 590.
not granted by default, 590.
origin of, 571, 572.
petitioner in, who may be, 579.
petition for,
facts which prima facie entitle petitioner to relief must be set out, 577.
lies,
after final adjudication, when, 577.
before a final adjudication, when, 577.
motion of leave to file, 577.
respondent in, who may be, 581.
under modern statutes, 572.
Public Documents. See also Documents; Records.
defined, 318, 319.
as evidence, 318-320.

Public Lands,
mandamus denied to compel Commissioner of Land,
to cancel land entry, 598.
to procure a title to land, 589.
Public Officers,
funds held by, not subject to garnishment, 480.
mandamus against, 595-598.
distinction between public and private officers, 595.
does not lie,
against federal officer if issued by state court, 597.
against state officer if issued by federal court, 597.
to compel a person to take public office, 596.
service and official duty distinguished, 595, 596.
where there is an adverse claimant of the title to the office, 597, 598.
exceptions to rule, 597, 598.
quo warranto proceedings against, 610, 611.
director of a national bank denied, 613.
federal and state officers, 613, 614.
in England, 610.
in the United States, 610, 611.
office must be of a public nature, 610.
to try title to the office, 597, 610,
Public or General Interest. See Interest, public or general.
Pure Plea,
to a bill in equity, 252, 253.
defined, 252.
purpose of, 252, 253.

Quality, certainty in pleadings as to, 81, 86, 87.
Quantity, certainty in pleadings as to, 81, 86, 87.
Questions of Law and Fact, 161, 162, 425-428.
effect of taking cases from jury on, 428.
findings on, 162.
in malicious prosecution, 426, 427.
questions involving the construction of a writing, 426.
submission of, 161, 162.
Quo Warranto Proceedings,
defined, 568.
against,
Corporation of London in early English history, 606, 607.
foreign corporations, 607, 608.
gas corporations, 609.
municipal corporations, 606, 607.
private corporations, 607-610.
private officers, 611, 612.
public officers, 610, 611, 613, 614.
telephone company, 610.

Quo Warranto Proceedings—*Continued*
bar to, 584-588.
costs in, 591.
denied, when, 585.
discretion of the court in issuing, 589, 590.
filed by the attorney-general, 570, 577.
in criminal cases, 573, 574.
in England and in Illinois, 574.
information,
motion of leave to file, 577.
petition in, cannot be transferred, 614.
issuance of writ,
in lower federal courts in aid of jurisdiction, 592.
in state courts in aid of appellate jurisdiction, 592, 593.
issue tried as in ordinary actions, 590, 591.
jurisdiction in, 573.
motion of leave to file information, 577.
not granted by default, 590.
origin of, 573, 574.
petitioner in,
must not be guilty of laches, 570.
who may be, 580.
petition in, 577, 614.
respondent in,
who may be, 581, 582.
writ of,
a prerogative writ, 579.
disuse of, 573.
granted at law and not in equity, 568.
judgment on, in early law courts, 573.
use of, in early ecclesiastical courts, 573.

Railroads, mandamus against, 595.
Rape, evidence of character of complainant allowed in prosecution for, 299.
Real Evidence, 283, 356-358.
defined, 283, 356.
documents may be introduced as, 359.
examples of, 356, 357.
exhibition of injured limb as, 357.
experiments before court as, 357.
inadmissible, if it would unduly prejudice a party, 358.
inspection of a person to determine his age as, 357.
left to the discretion of the court, 358.
rule stated, 357, 358.
submission of an object to the senses of the tribunal as, 356.
views by jury, under direction of an officer of the court, of,
the place where the material litigated fact took place, 357.
the real property in litigation, 357.

Reasoning,
evidence distinguished from, 282.
irrelevant facts excluded by the fundamental rule of, 285.
Rebutter, filing of, 27, 144.
Receiver,
attachment of property held by, not allowed, 435.
funds held by, not subject to garnishment, 480.
Recital, pleadings must not be by way of, 90, 92.
Records,
of an action,
defined, 529.
conclusiveness of the, 531, 533.
entry of the, 529, 530.
false entry on, 532.
includes what, 529.
incorporation of testimony into the, 529.
may not be,
added to, 532.
contradicted, 532.
mistakes in,
may be corrected when discovered, 530, 531.
power of court to correct, 530, 531.
on appeal, 202, 203.
abstract of, 202, 203.
contents of, 202.
filing of, with court of appeal, 202.
preparation of, 202, 203.
public documents,
defined, 318, 319.
as evidence, 318-320.
examples of, 319.
rule stated, 318.
need not be kept by a public officer himself, 319, 320.
recorded writing, proof of execution unnecessary, 364.
Re-examination, of witnesses, 393, 404. See also Witnesses, re-examination of.
Rejoinder, filing of, 27, 144.
Relationship, declaration of, as evidence, 312, 313.
Remedies, extraordinary, 567-627. See also Extraordinary Remedies.
Remittitur, 192.
Replevin, Action of, 18, 32, 38, 48-51, 67, 103.
affidavit showing plaintiff's right to the goods required, when, 50.
applies only to personal property, 51.
at common law, 49, 50, 51.
cannot be maintained for fixtures or other part of an interest in real estate, 48, 49.

Replevin, Action of—*Continued*
declaration, filing of, in an, 50.
notice to defendant of intention to file declaration of cause of action, effect of, 103.
object of, 49.
original writ, 49, 50.
origin of, 49.
possession, right of present, must be in plaintiff, 49.
the writ, 49-51.
under statutes, 48, 49, 52.

Replication,
to a bill in equity, 243, 244.
in federal courts, 243, 244.
to a declaration, 20, 26, 27, 111, 113, 126, 141-143, 243, 244.
defined, 141, 243, 244.
at common law, 141.
demurrer to, 111, 113, 142, 144.
departure from first pleading vital to the, 142, 143.
filing of, 144.
forms of, 141.
general issue as a, 126.
insufficiency of, when, 142.
not required, when, 143.
paragraphs in, 143.
preparation of, 20.
replying new matter, 142, 143.
rules governing, 26, 27.
special replication, abolished in most jurisdictions, 272.
under modern codes and statutes, 141, 142.

Res Gesta,
declarations which are a part of some fact or transaction that is itself admissible, as evidence, 343-346.
admission act and the characterizing declaration must occur practically simultaneously, 344-346.
may be shown otherwise than by the testimony of the person who made them, to establish the existence of facts asserted therein, 343.
narrative of past occurrences excluded, 346.
rule stated, 343.
scope of the exception, 343, 344.

Respondent,
to a writ of habeas corpus,
directing the writ to the, 649, 650.
must answer within time named in writ, 650.
return of the writ by, 650.

Restraint of Trade, contracts in, illegal in Great Britain and the United States, 608.

Sales, presumptions as to evidence in, 410.
Schools,
inspector of, powers of, 507.
kidnapping of scholar, writ of habeas corpus by master for the custody of scholar, 641.
master, restraint of the liberty of scholar by, 640, 641.
Scire Facias, Writ of, issuance of, 496, 497.
Self-Incrimination,
privilege,
of accused against, 385, 386.
of an ordinary witness against, 386-388.
Sentence,
error in,
writ of error for, 622.
Service of Process. See Process, service of.
Set-Off and Counterclaim,
failure to set up, effect of, 538.
in federal courts, 270.
judgment bars, when, 538.
pleas by way of, 139, 140.
to be set up, when, 538.
Sheriff,
is bound to obey orders of judgment creditor in the execution of judgment, 560.
is under the control of the court, 559.
right of, to bond of indemnity from judgment creditor in execution of judgment, 562, 563.
staying execution of a writ on order of judge, no liability of, for, 560.
Signature, to the bill in equity, 233, 240, 241. See also Bill in Equity.
Societies, as parties to an action, 148, 149.
Special Appearance, entering of, to an action, 105, 106.
Special Demurrer, 23, 24, 110, 111. See also Demurrer.
defined, 111.
abolished by modern statutes, 110.
defect in form of pleading reached by, 23, 24.
discretion of defendant in, 24, 112.
Specific Performance, of contracts, power of equity courts to grant, 58.
Stating Part, in the bill in equity, 233, 234. See also Bill in Equity.
Statute of Frauds, demurrer to bill in equity on account of the, 247.
Statute of Limitations, demurrer to bill in equity on account of the, 247.
Statutes,
on pleading,
importance of the study of, 9.
remedying abuses of the rules of pleading, 16.
unconstitutional,
imprisonment under, writ of habeas corpus for, 642, 643.
question for the court to decide, 643.
Street Railroads, mandamus to compel the issue of transfers, 587.

Subpoena, 239.
Substantive Law,
defined, 629.
adjective law distinguished from, 629.
presumptions as to evidence are matters of, 410-412.
Suits in Equity, 7, 8, 56, 57, 210, 211. See also Equity.
Summons. See also Process, service of.
defined, 18.
defects in, 151, 152.
motion to quash upon return of, 151, 152.
service of, 150, 151.
Supersedeas, 197, 200.
defined, 197.
denial of, effect of, 197.
staying of execution by, 197, 200.
Surplusage,
defined, 135, 136.
demurrer will not reach the defect of, 136.
to be avoided in pleading, 136.
Sur-rebutter, filing of, 27, 144.
Sur-rejoinder, filing of, 27.
Surveys, as evidence, 315.

Taxes, payment of, imprisonment to compel, 635.
Telephones,
mandamus against telephone company, 595.
quo warranto proceedings against telephone company, 610.
Tenant in Common, attachment of property by, 434.
Testimony,
defined, 283.
expert, 353-355. See also Expert Testimony.
former,
evidence of,
an exception to the rule in regard to the admissibility of hearsay evidence, 308-310.
by the testimony of anyone who heard it at former trial, 310.
how shown, 310.
must have been given at a former trial between parties, 309.
on account of the,
absence of a former witness from the jurisdiction, 308, 309.
death, insanity, or physical inability of witness to attend court, 308.
of third party to show contract, 306, 307.
of witness expressing opinion, 347-355. See also Opinion, evidence.
Time, certainty in pleadings as to, 81, 86, 87.
Torts,
actions for, 38-54, 72-74.
classification of, 38.

Torts, actions for—*Continued*
joint, 73.
parties to, 72-74.
separate, 73.
sometimes hard to make proof in, 39.
"waiving the tort and suing in assumpsit," term explained, 34.
Traverse, to a declaration, 115, 118-129, 132, 133, 136. See also Denial, to a declaration.
Trespass,
ab initio, 41.
defined, 41.
action of, 32, 39-42, 46, 47, 88.
cannot be maintained for consequential injury, 41.
force necessary to maintain an, 40, 41.
is for a positive wrong, 40.
lies for injury done by force to plaintiff's property, person or rights in relation thereto, 39-41.
property to support, must be in the possession of plaintiff at time of injury, 41, 42, 88.
trespass on the case, action of, distinguished from, 46, 47.
where injury was caused by mere continuance of original act, 41.
Trespass on the Case, Action of, 15, 32, 45-47, 88.
commonly called case, 45.
distinctive features of the, 46, 47.
for injury,
to an intangible thing which cannot be the object of force, 45.
to franchise, 45.
to reversionary interest, 42, 45.
which was not immediate but consequential, 45.
is used to recover damages where injury is not accompanied by force, 45.
may arise from conduct of the defendant, 45, 46.
origin of, 15, 46.
supplements the actions of trespass and trover, 46.
trespass, action of, and trover, action of, distinguished from, 46, 47.
Trial,
closing of, 143, 144.
of cases without jury, 159-163.
argument of counsel in, 162.
court, function of, in, 160.
evidence in, 160, 161.
exceptions to, 160, 161.
findings of law and fact by the court, 162.
judgment on finding, 162, 163.
submission of proposition of law and fact, 161, 162.
taking the case from the jury, 427, 428.
effect of, 428.
question to be decided by the court, 427.

Trover, Action of, 32, 38, 42-44, 66.
allegations in, 66.
cannot be maintained, when, 43, 44.
essentials of, 43, 44.
lies,
for conversion of plaintiff's personal property by defendant, 42, 43.
when action of trespass will not lie, 44, 45.
object of an, 43.
plaintiff,
must show conversion by defendant, 45.
need not be the sole owner of the property, 44.
presumption that the property was lawfully obtained, 43.
substance of an, 43.
trespass on the case, action of, distinguished from, 46, 47.
Trustee,
attachment of property held by, not allowed, 435.
funds held by, not subject to garnishment, 479, 480.
process, 474.

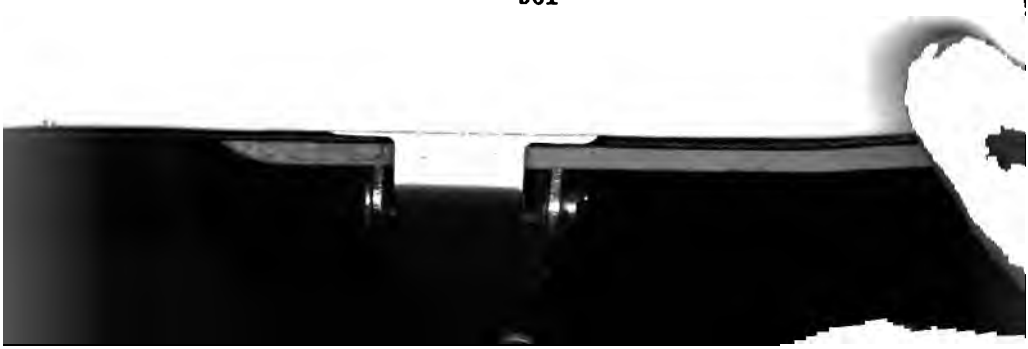
Ultimate Facts, 211, 214, 218, 219, 246, 283, 284, 287, 288, 405.
defined, 283.
determination of, 288, 405.
by rules of pleading, 288.
evidential facts distinguished from, 284.
example of, 283, 284.
in equity, 211, 214, 218, 219, 246.
legal tribunals determine what evidence of, is required in a given case, 287.
United States Supreme Court,
jurisdiction of, 591, 592.
in admiralty, 591.
to issue writs,
affecting ambassadors, consuls, and public ministers, 591.
in aid of jurisdiction, 592.
of mandamus, 594.
of prohibition to district courts, 591.

Value,
certainty as to, in pleadings, 86.
expert opinion as to, of a piece of real property, 355.
testimony of an ordinary witness as to, in certain lines of business, 352, 353.
Vendor and Purchaser, admissions by former owner of real property binding on subsequent purchaser, when, 422.
Venue,
defined, 155.
change of, 155, 156. See also Change of Venue.
necessary to be proved by plaintiff in civil actions, 179.

Verdict,
of the jury, 145, 146, 190-193, 426-428.
amendment of, 191, 192.
amount of, in excess of amount asked for by plaintiff may be cured by remittitur, 192.
arrived at by chance, collusion, or duress will be set aside, 190.
duty of court in respect to, 191.
formerly all verdicts were delivered orally in open court, 190.
forms of, 190.
general verdict, defined, 426.
impeachment of, 192.
judgment on, 194, 195.
motion to direct, 183, 184.
by defendant, 183.
by plaintiff, 183, 184.
jury has no discretion in the matter, 183.
overruled, exceptions to, 184.
must be received in open court, 190.
of no binding force until it has been received and recorded, 191.
oral, 190.
polling of jury, 191.
power of court to direct the signing and sealing of a, 191.
reception of, 190, 191.
sealing of, after deliberations of jury, 189.
setting aside, 428.
special verdict, 145, 426, 427.
defined, 426.
jury cannot be compelled to render, 427.
use of, 427.
written, 190.
Verification,
of petition for writ of habeas corpus, 649.
of pleadings, 100, 101, 233, 241, 242.
by oath, 100, 101.
in equity, 100, 233, 241, 242.
under codes, 100.
Voluntary Appearance, 17.
Voluntary Non-Suit, 181, 182.

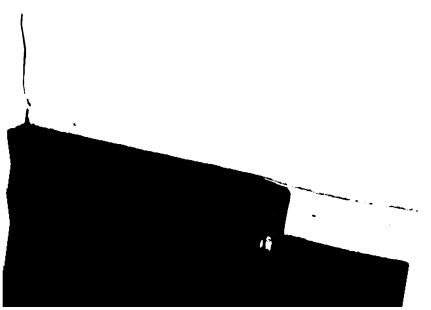
Waiver, of privileges by witnesses, 387, 388. See also Witnesses, privileges of.
Wayside Courts of England, 10.
Wills,
decree allowing instrument as will without personal service on heirs of testator, when, 521.
execution of a will, declaration of evidence to show, inadmissible, 340.
form of,
prescribed by statute, 373.

Wills—*Continued*
fraud, duress, or undue influence in, declaration of testator as evidence to show, 340.
lost will,
statements of the testamentary intention of testator as evidence to establish contents of a, 341, 342.
Sugden v. Lord St. Leonards, rule of, 342.
parol evidence rule as applied to, 373-375.
testator, mental capacity of,
declarations of testator, evidence of, to show, 340, 341.
Witnesses, 379-404.
calling of, 180.
cross-examination of, 181, 393, 399-403. See also Cross-Examination.
denial of compulsory process for the prisoner's witness, effect of, 647.
depositions of, 175-178. See also Depositions.
direct examination of, 393-399. See also "examinations of, in chief," under this heading.
defined, 393.
forms of, 393.
examinations of, 180, 181, 392-404.
in chief, 363, 396-399.
defined, 393.
impeachment on, 397-399.
leading questions, 397.
object of, 396, 397.
of subscribing witness, 398.
order in which matters shall be presented, within discretion of the court, 396.
personal knowledge, 394, 395.
defined, 394, 395.
how acquired, 395.
witnesses must testify to facts not impressions, 394.
refreshing recollection, 394, 395.
inspection of writing by adversary and cross-examination of witness upon it, 395.
use of memorandum made by witness himself or another, 395.
may be written or printed, 395.
exclusion of, from court, 174, 175, 396.
for rebuttal, 175.
impeachment of, 397-403.
inquiries calculated to elicit the facts not considered evidence of impeachment, 398.
of subscribing witness, 398.
on cross-examination, 400-404.
on direct examination, 397, 398.
party cannot impeach his own witness, 398.
incompetency of, 379-383.
defined, 379, 383.



Witnesses, incompetency of—*Continued*
at common law, 379, 380.
on account of conviction of crime, insanity, interest, marital relationship, mental immaturity, or religious belief, 380-382.
privilege and incompetency distinguished, 383, 384.
rule in the federal courts, 383.
special incompetency defined and explained, 381.
under modern statutes, 381-383.
number of, 180, 181.
privileged communications of, 388-392. See also Privileged Communications.
between,
attorney and client, 389-391.
husband and wife, 391, 392.
privileges of, 383-392.
defined, 384.
against self-incrimination, 384-388.
claim of the privilege by an ordinary witness, 386, 387.
court may advise witness of this privilege, 386, 387.
effect of assertion of privilege by the accused, 385, 386.
may not be claimed, when, 388.
scope of privilege, 384, 385.
under the Constitution of the United States and constitutions of the several states, 384.
unless protected by,
pardon extending complete immunity, 384.
Statute of Limitations, 384.
waiver of privilege by accused, 386.
waiver of privilege by an ordinary witness, 387, 388.
incompetency distinguished from, 383, 384.
re-examination of, 393, 404.
defined, 393.
limits of, 404.
swearing of, 173, 174.
testimony of,
personal knowledge defined, 393, 394.
refreshing recollection during, 394, 395.
Writs, 6, 7, 12, 14-16.
consequences of suing out wrong writ, 7.
evidence under, 15.
importance of choice of proper writ, 15, 16.
motion to quash upon return of, 151, 152.
of,
attachment, 431-473. See also Attachment.
certiorari. See Certiorari, Writ of.
entry, actions by, 31, 51, 52.
habeas corpus. See Habeas Corpus, Writ of.
mandamus. See Mandamus, Writ of.

Writs, of—*Continued*
prohibition. See Prohibition, Writ of.
quo warranto. See Quo Warranto Proceedings.
original, 6, 7, 12, 14-16, 56.
pleading by, 6, 7.
power of chancellor to issue, 11-13.
prerogative, 630.
Written Interrogatories, 153.



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